

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, :
 :
 Plaintiff-Appellee, : Case Nos. 2007-0983 and
 : 2007-1047
 :
 v. : On Appeal from the
 : Ashtabula County of Appeals,
 RALPH E. CLARK, : Eleventh Appellate District, Case
 : No. 2006-CA-4
 :
 Defendant-Appellant. :

MERIT BRIEF OF APPELLANT RALPH E. CLARK

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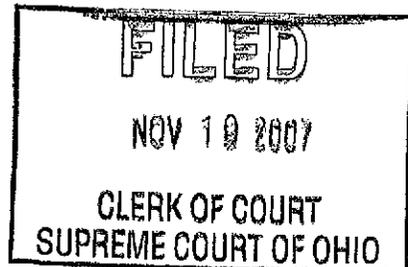


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Certified Question

Is a guilty plea knowing, intelligent, and voluntary when the trial court misinforms the defendant that he or she will be subject to five years postrelease control if released and up to nine months in prison for any violation when, in fact, the defendant faces a lifetime of parole and re-incarceration for life for any violation...... 12

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STATEMENT OF THE CASE AND THE FACTS

Ralph Clark pleaded guilty to the aggravated murder of his wife of 22 years, Carolyn Clark, along with a firearm specification. He was sentenced to life in prison with parole eligibility after serving twenty-five full years of imprisonment for aggravated murder and three years for the firearm specification.

Mr. Clark, his trial counsel, and the prosecuting attorney all signed a written plea agreement labeled "Plea of Guilty," which contained the following language:

Post-Release Control. I understand that after I am released from prison, I may have a period of post-release control for five (5) years following my release from prison. If I violate a post-release control sanction imposed upon me, any one or more of the following may result.

- (1) The Parole Board may impose a more restrictive post-release control sanction upon me; and
- (2) The Parole Board may increase the duration of the post-release control subject to a specified maximum; and
- (3) The more restrictive sanction that the Parole Board may impose may consist of a prison term, provided that the prison term cannot exceed nine months and the maximum cumulative prison term so imposed for all violations during the period of post-release control cannot exceed one-half of the stated prison term originally imposed upon me; and
- (4) If the violation of the sanction is a felony, I may be prosecuted for the felony and, in addition to any sentence it imposes on me for the new felony, the Court may impose a prison term, subject to a specified maximum, for the violation.

I hereby certify the Court read to me, and gave to me in writing, the notice set forth herein.

Plea Form at 1-2 (emphasis added).

At the plea hearing, the trial court engaged Mr. Clark in the required colloquy. In so doing, the trial court informed Mr. Clark of the maximum

penalties to which he would be subject if the trial court accepted his guilty plea. The trial court also described the contours and details of Mr. Clark's eventual release from incarceration and the ramifications of violating the terms of that release:

THE COURT: Okay. All right. Now, next I'm required to tell you the Court will be imposing a prison term and once that prison term is imposed, you're going to be required to serve the prison term that's imposed. Again, in this case, it's going to be at least 28 years.

After you serve your prison term, you'll be eligible for release under post-release control. And I believe in your case, if you do receive parole, your post-release control will be mandatory. And that means that there will be certain conditions that you're going to have to live up to after you're released, if you're released after 28 years.

The maximum period of time you could be on post-release control would be five years. And I would expect you'd probably get the full five years.

There would be certain conditions that you'd have to fulfill. One condition, obviously, would be that you have to remain law abiding. But there would be other conditions.

Now, if you're placed on post-release control and if you violate any of those conditions of post-release control, you'd be charged with a violation and you would have a hearing before the Parole Board, and if it were determined at the hearing that you had violated one or more conditions of your post-release control, you could have a new prison term imposed of up to nine months in duration; however, the total of all such new prison terms could not exceed one-half of your original sentence.

Now, do you have any questions about the mandatory post-release controls that would be imposed after you served your full sentence?

THE DEFENDANT: No, sir.

Plea Hrg. T.p. 14-15 (emphasis added).

The trial court ultimately accepted Mr. Clark's plea and set the case for sentencing five days later, noting that a pre-sentence investigation report was "not necessary for this sentencing." Plea Hrg. T.p. 34.

But at the sentencing hearing, the trial court imposed a different sentence than the plea agreement described—the trial court imposed a prison term under which Mr. Clark would be released on potentially unlimited “parole” instead of limited “post-release control.” The trial court also detailed the terms of that release to Mr. Clark:

The trial court then told Mr. Clark that he would be subject to a mixture of both postrelease control and parole upon release:

THE COURT: Now, normally, we use a sentencing form at the Sentencing Hearing and it talks about post-release control. I’m going to use this form today and I’m going to read this form to you, but if the defendant were to be released, after 28 years, he would certainly be under certain conditions that they call parole, it’s not called post-release control.

But I’m going to use this form and I’m going to read it to you, Mr. Clark, because what’s in this form would apply to you.

If you’re released from prison, and I’m going to change the word “after” to “if” because that’s not a certainty.

If you’re released from prison, you will – this will be mandatory – have a period of post-release control, or parole, for at least five years following your release from prison.

If you violate a post-release control[] sanction imposed upon you, any one or more of the following may result:

One, the Parole Board may impose a more restrictive post-release control sanction upon you.

And number two, the Parole Board may increase the duration of the post-release control, subject to the specified maximum.

And number three, the more restrictive sanction that the Parole Board may impose may consist of a prison term, *provided that the prison term cannot exceed nine months, and the maximum cumulative prison term so imposed for all violations during the period of post-release control cannot exceed one-half of the stated prison term originally imposed upon you.*

And number four, if the violation of the sanction is a felony, you may be prosecuted for the felony, and in addition to any sentence it imposes for the felony, for the new felony, the Court may impose a prison term, subject to the specified maximum for the violation. Now, I’m going to hand this form out to you. I’m going to give you a chance to look at it with your attorney. I’m going to ask you to sign it and return it to the Court.

(The Bailiff handed the above-mentioned form to the defendant and counsel, which said form was then returned to the Court.)

THE COURT: All right, let the record show the Notice Form has been returned to the Court. It's been signed by the defendant and counsel. The Court will accept it and file it with the Clerk of this Court.

Sentencing Hrg. T.p. 37-40 (emphasis added).

The written sentencing entry imposed “a period of post-release control pursuant to R.C. 2929.14(F) and R.C. 2967.28 (B) & (C).” Sentencing Entry at 2.

In addition, the sentencing entry ordered Mr. Clark “to pay all prosecution costs, court-appointed counsel costs and any fees permitted pursuant to R.C. 2929.18(A)(4). Id. at 3. That order was *not* part of the sentence imposed at the sentencing hearing, and was reversed on appeal.

On appeal, Mr. Clark challenged his plea because the plea agreement included postrelease control, not parole. He also challenged his financial sanctions. The court of appeals unanimously reversed his financial sanctions, but, by a two-to-one vote, upheld the validity of his plea. Apx. at A-1.

Mr. Clark filed a motion to certify a conflict with the decision of the Twelfth Appellate District in State v. Prom, 12th Dist. No. CA2002-01-007, 2003-Ohio-6543. He asked the court to certify the following question:

Is a guilty plea knowing, intelligent, and voluntary when the trial court misinforms the defendant that he or she will be subject to five years postrelease control if released and up to nine months in prison for any violation when, in fact, the defendant faces a lifetime of parole and re-incarceration for life for any violation?

The court of appeals certified the following question to this Court:

Is a guilty plea knowing, intelligent, and voluntary when the trial court misinforms the defendant that he or she will be subject to five years postrelease control if released and up to nine months in prison for any violation when, in fact, the defendant faces a lifetime of parole and re-incarceration for life for any violation?

This Court accepted Mr. Clark's discretionary appeal and the certified conflict. This Court consolidated the cases for purposes of briefing and argument.

ARGUMENT

Proposition of Law:

A guilty plea to a sentence carrying a life sentence is not knowing, voluntary, and intelligent when the trial court tells the defendant that he or she will be subject to time-limited postrelease control upon release, instead of indefinite parole.

I. Introduction

Parole is very different from postrelease control. Parole for aggravated murder can last for life. Postrelease control ends after five years. A defendant faces a possible life prison term for a parole violation. A defendant faces only nine months in prison for a postrelease control violation.

A defendant pleading guilty to aggravated murder does not understand his sentence if he thinks he is subject to postrelease control instead of parole. Here, the prosecutor did not protest when the judge provided the incorrect information. Defense counsel did not object. And even the trial judge did not understand the penalties Mr. Clark faced. When the two lawyers and the judge did not understand the sentence, it is unreasonable to assert that the defendant understood the sentence.

Such a misinformed defendant must be given the option to withdraw from a plea that resulted in a sentence that no one in the courtroom understood.

II. Discussion

Postrelease control and parole are two very different sanctions.

The sentence described in Mr. Clark's plea agreement was very different than the sentence the court ultimately imposed. Parole is an executive decision to relieve a defendant of part of his sentence, and in Mr. Clark's case, parole can extend for life. In re Varner (1957), 166 Ohio St. 340, 343, 142 N.E.2d 846. By contrast, a court makes postrelease control part of a defendant's sentence. R.C. 2967.28(B).

The theoretical differences between postrelease control and parole translate into very real practical differences. A sentence that includes five years of postrelease control after twenty-three years in prison is far different than a sentence that includes a lifetime of restrictions, even after release. Mr. Clark can be sent to prison for life for any violation of parole. By contrast, a defendant who violates postrelease control can only be imprisoned for half of his original prison term, and only in nine-month intervals. R.C. 2929.14(F)(1) and 2967.28. In Mr. Clark's case, the plea agreement gave him objectively wrong information about how his sentence will end. A defendant does not understand his maximum sentence if he doesn't understand how the sentence ends.

This is not a case about a mere slip of the tongue.

This is not a case in which a trial judge accidentally used the expression "postrelease control" instead of "parole." The trial court substantively, repeatedly, and erroneously described postrelease control to Mr. Clark during

the plea process. As in the Prom case, Mr. Clark's written plea form misinformed him that he would be subject to postrelease control and that the penalty for violation would be nine months incarceration. Plea Form at 1-2. As in Prom, Mr. Clark was misinformed at the plea colloquy as well. Plea Hrg. T.p. 14-15. Finally, Mr. Clark was misinformed at sentencing. Sentencing Hrg. T.p. 37-40. The trial court gave Mr. Clark the same wrong information on three separate occasions in the space of less than a week. As a consequence, Mr. Clark "necessarily was unaware of the maximum penalty to which [he] was exposed by [his] plea." Prom, 2003-Ohio-6543, at ¶29.

A guilty plea is not knowing, voluntary, and intelligent, where the trial repeatedly misinforms the defendant that, after his release, the maximum penalty he would face for violating the terms of his supervision would be incarceration no more than nine months in prison per violation totaling no more than half of his original sentence. If Mr. Clark is released from prison, he will be subject to indefinite parole, not limited postrelease control. R.C. 2967.01(E), 2967.13, and 2967.28. Under parole, Mr. Clark faces the reinstatement of his life prison term if he violates his release conditions. R.C. 2967.15.

Murder and aggravated murder are not first-, second-, third-, fourth- or fifth-degree felonies.

The trial court may have been confused about the role of postrelease control. Postrelease control does not attach to Mr. Clark's sentence because murder is not a felony of the first, second, third, fourth or fifth degree. R.C. 2967.28 (specify paragraph). Murder and aggravated murder are offenses

separate from first-, second-, third-, fourth- or fifth-degree felonies. R.C. 2901.02. The General Assembly directed that those convicted of murder and aggravated murder should be punished differently than those convicted of an enumerated felony. R.C. 2903.01(F), 2903.02(D), and 2929.02.

Misinforming a defendant about postrelease control is a substantial mistake.

A guilty plea is valid only if it is knowing, intelligent, and voluntary. State v. Raglin (1998), 83 Ohio St.3d 253, 262; Boykin v. Alabama (1969), 395 U.S. 238. “Failure on any of those points renders a resulting conviction unconstitutional.” State v. Prom, 12th Dist. No. CA2002-01-007, 2003-Ohio-6543, at ¶22, citing State v. Engle, 74 Ohio St.3d 525, 1996-Ohio-179. For a plea to be knowing, intelligent and voluntary, the trial court must ensure that a defendant “has a full understanding of what the plea connotes *and of its consequence*.” Boykin, 395 U.S. at 244 (emphasis added). Here, the trial court informed Mr. Clark that the worst penalty which he would face, should he violate the terms of his eventual release, is nine months in prison. In fact, the maximum penalty Mr. Clark would face is the balance of his life sentence. The trial court’s erroneous advice prevented Mr. Clark from entering a knowing, voluntary, and intelligent plea. Prom, 2003-Ohio-6543, at ¶28-29.

Substantial compliance with the requirements of Crim.R. 11 is generally sufficient. State v. Caplinger (1995), 105 Ohio App.3d 567, 572. But misinforming a defendant about the maximum penalty faced is not substantial compliance. State v. Carroll (1995), 104 Ohio App.3d 372, 379. “By erroneously advising [a defendant] that post-release control requirements are

mandatory . . . and what terms of imprisonment might be imposed for their violation, the court inadvertently understated the maximum penalty that might apply to any re-incarceration after [the defendant's] release." Prom, 2003-Ohio-6543, at ¶27.

The trial court substantially misinformed Mr. Clark about the consequences of violating his parole, distinguishing this case from those cases in which the trial court simply did not fully inform the defendant about parole. See, e.g., State v. Belvin McGee, 8th Dist. No. 77463, 2001-Ohio-4238, at*5 ("the record does not indicate the appellant was misinformed by the trial court"); State v. Davis (Sept. 28, 2000), 8th Dist. No. 76315, at *7 (defendant was not "misled or misinformed him concerning the sentencing procedures and the parole board's discretionary role"). In this case, the trial court's statement that Mr. Clark would be subject to a penalty of nine months instead of life imprisonment was more than an omission—it was misinformation:

Substantial compliance might arise out of an omission, but it's far more difficult to find with respect to an affirmative misstatement, especially one that understates the penalty involved. That is underscored where the error occurred both in the written plea waiver and the court's oral colloquy with the defendant, both of which happened here.

State v. Prom, 12th Dist. No. CA2002-01-07, 2003-Ohio-6543, at ¶28.

As in Prom, Mr. Clark's written plea form misinformed him that he would be subject to postrelease control and that the penalty for violation would be nine months incarceration. Plea Form at 1-2. As in Prom, Mr. Clark was misinformed at the plea colloquy as well. Plea Hrg. T.p. 14-15. Finally, Mr. Clark was misinformed at sentencing. Sentencing Hrg. T.p. 37-40. The trial

court gave Mr. Clark the same wrong information on three separate occasions in the space of less than a week. As a consequence, Mr. Clark “necessarily was unaware of the maximum penalty to which [he] was exposed by [his] plea.” Prom, 2003-Ohio-6543, at ¶29. The trial court erred in accepting his plea, see id. This Court should vacate the plea and remand Mr. Clark’s case for trial.

Release under parole is no longer mere “speculation” in Ohio.

In contrast with the federal system, Ohio prisoners have a right to be considered for parole based on objective criteria. The State and the Fourth District come to the opposite conclusion in part based on an outdated understanding of parole in Ohio. The First, Fourth and Eleventh Districts wrongly rely on federal case law and outdated state case law to determine state-law rights in Ohio’s parole system. State v. Clark, 11th Dist. No. 2006-A-0004, 2007-Ohio-1780 at ¶18; State v. Baker, 1st Dist. No. C-050791, 2006-Ohio-4902, discretionary appeal denied, 112 Ohio St.3d 1471, 2007-Ohio-388; State v. Hamilton, 4th Dist. No. 05CA4, 2005-Ohio-5450. Ohio inmates, especially inmates who have pleaded guilty, have a reasonable expectation of release under statutorily mandated terms. The Ohio Parole Board’s discretion to grant or deny release “must yield when it runs afoul of statutorily based parole eligibility standards and judicially sanctioned plea agreements.” Layne v. Ohio Adult Parole Auth., 97 Ohio St. 3d 456, 2002-Ohio-6719, at ¶28. Under Layne, Mr. Clark has a right to “meaningful parole consideration” at the end of 28 years. Release is not guaranteed, but it is far from mere “speculation.”

If a defendant does not understand what happens at the end of a sentence, he does not understand the maximum sentence.

The explanations of postrelease control given to Mr. Clark shifted throughout the trial court proceedings. The plea agreement stated that he would be released from prison. "I understand that after I am released from prison, I may have a period of post-release control for five (5) years following my release from prison." Plea agreement at 1. At the plea colloquy and sentencing hearing, the trial court stated that postrelease control would be imposed "if" Mr. Clark was released. T.p. (plea hearing) 14-15, T.p. (sentencing) 38. The judgment entry of sentence omitted postrelease control entirely.

When neither the trial court nor trial counsel can consistently explain how a sentence would end, a defendant cannot understand what exactly the maximum sentence is.

Certified Question

Is a guilty plea knowing, intelligent, and voluntary when the trial court misinforms the defendant that he or she will be subject to five years postrelease control if released and up to nine months in prison for any violation when, in fact, the defendant faces a lifetime of parole and re-incarceration for life for any violation?

No. For the reasons stated in the discussion of the proposition of law, a plea is not knowing, intelligent or voluntary when the trial court misinforms the defendant that he or she will be subject to five years postrelease control if released and up to nine months in prison for any violation when, in fact, the defendant faces a lifetime of parole and re-incarceration for life for any violation.

CONCLUSION

This Court should reverse the decision of the court of appeals, vacate Mr. Clark's plea, and remand this case for trial.

Respectfully submitted,

David H. Bodiker (0016590)
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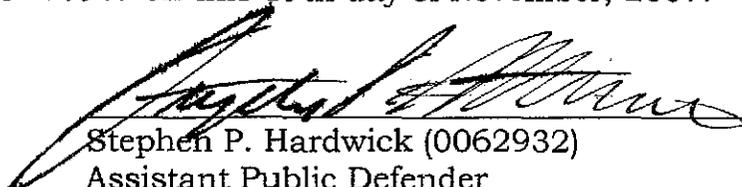
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **MERIT BRIEF OF APPELLANT RALPH E. CLARK** has been sent by U.S. Mail, postage prepaid to Shelley Pratt, Ashtabula County Assistant Prosecutor, Courthouse 25 West Jefferson Street, Jefferson, Ohio 44047 on this 19th day of November, 2007.



Stephen P. Hardwick (0062932)
Assistant Public Defender

IN THE SUPREME COURT OF OHIO

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	:	
v.	:	On Appeal from the
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RALPH E. CLARK,	:	Eleventh Appellate District, Case
	:	No. 2006-CA-4
Defendant-Appellant.	:	

APPENDIX TO

MERIT BRIEF OF APPELLANT RALPH E. CLARK

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellee,

v.

RALPH E. CLARK,

Defendant-Appellant.

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: Ashtabula County of Appeals,
: Eleventh Appellate District,
: Case No. 2006-CA-4
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**NOTICE OF APPEAL
OF APPELLANT RALPH E. CLARK**

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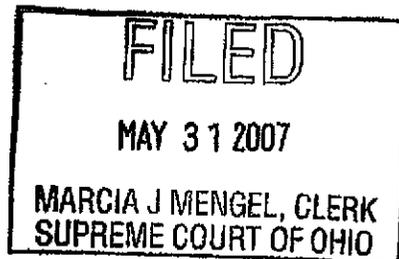
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NOTICE OF APPEAL OF APPELLANT RALPH E. CLARK

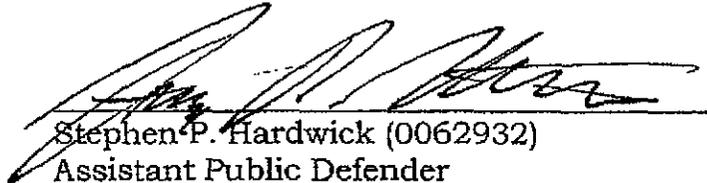
Appellant Ralph E. Clark hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Ashtabula County Court of Appeals, Eleventh Appellate District in State v. Clark, Court of Appeals Case No. 2006-CA-4, entered on April 16, 2007.

This case raises a substantial constitutional question, involves a felony,

and is one of public or great general interest.

Respectfully submitted,

David H. Bodiker (0016590)
Ohio Public Defender

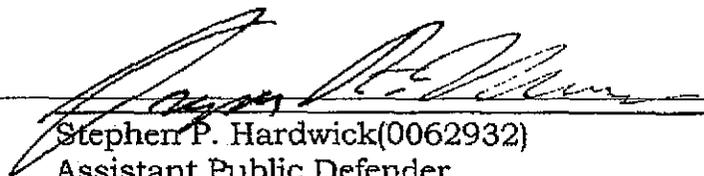

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **NOTICE OF APPEAL OF APPELLANT RALPH E. CLARK** has been sent by U.S. Mail, postage prepaid to Shelley Pratt, Ashtabula County Assistant Prosecutor, Courthouse 25 West Jefferson Street, Jefferson, Ohio 44047 on this 31st day of May, 2007.



Stephen P. Hardwick(0062932)
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Counsel For Defendant-Appellant,
Ralph E. Clark

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IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellee,

v.

RALPH E. CLARK,

Defendant-Appellant.

:
:
: Case No. **07-1047**
:
: On Appeal from the
: Ashtabula County of Appeals,
: Eleventh Appellate District,
: Case No. 2006-CA-4

**NOTICE OF CERTIFIED CONFLICT
OF APPELLANT RALPH E. CLARK**

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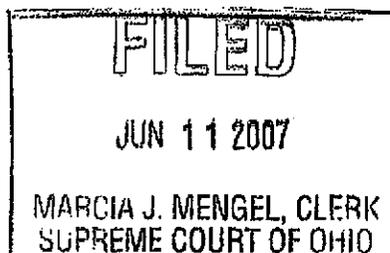
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NOTICE OF CERTIFIED CONFLICT OF APPELLANT RALPH E. CLARK

Appellant Ralph E. Clark hereby gives notice that on June 5, 2007, the Ashtabula County Court of Appeals, Eleventh Appellate District certified the following question in State v. Clark, Court of Appeals Case No. 2006-CA-4:

Is a guilty plea knowing, intelligent, and voluntary when the trial court misinforms the defendant that he or she will be subject to five years postrelease control if released and up to nine months in prison for any violation when, in fact, the defendant faces a lifetime of parole and re-incarceration for life for any violation.

Respectfully submitted,

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Counsel For Defendant-Appellant,
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been sent by U.S. Mail, postage prepaid to Shelley Pratt, Ashtabula County Assistant Prosecutor, Courthouse, 25 West Jefferson Street, Jefferson, Ohio 44047 on this 11th day of June, 2007.


Stephen P. Hardwick (0062932)
Assistant Public Defender

COURT OF APPEALS

FILED

STATE OF OHIO

COUNTY OF ASHTABULA

2007 APR 16 P 12 IN THE COURT OF APPEALS

SS. CAROL A. HEAD, CLERK OF COURTS
COMMON PLEAS COURT
ASHTABULA CO., OH
ELEVENTH DISTRICT

STATE OF OHIO,

Plaintiff-Appellee,

JUDGMENT ENTRY

- vs -

CASE NO. 2006-A-0004

RALPH E. CLARK,

Defendant-Appellant.

For the reasons stated in the Opinion of this court, the first assignment of error is without merit, and the trial court's judgment with respect to appellant's guilty plea is affirmed. The remaining assignments of error are with merit. The trial court's judgment ordering appellant "to pay all prosecution costs, court-appointed counsel costs and any fees permitted pursuant to R.C. 2929.18(A)(4)" is reversed, and this cause is remanded to the trial court for further proceedings regarding economic penalties consistent with this Opinion.



JUDGE DIANE V. GRENDALL

MARY JANE TRAPP, J., concurs,

WILLIAM M. O'NEILL, J., dissents.

COURT OF APPEALS

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2007 APR 16 P 12:11

CAROL A. HEAD
CLERK OF COURTS
COMMON PLEAS COURT
ASHTABULA CO, OH

THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
ASHTABULA COUNTY, OHIO

STATE OF OHIO, : OPINION
Plaintiff-Appellee, :
- vs - : CASE NO. 2006-A-0004

RALPH E. CLARK, :
Defendant-Appellant. :

Criminal Appeal from the Ashtabula County Court of Common Pleas, Case No. 05 CR 118.

Judgment: Affirmed, in part, reversed, in part, and remanded.

Thomas L. Sartini, Ashtabula County Prosecutor and *Shelley M. Pratt*, Assistant Prosecutor, Ashtabula County Courthouse, 25 West Jefferson Street, Jefferson, OH 44047 (For Plaintiff-Appellee).

David H. Bodiker, Ohio Public Defender, and *Stephen P. Hardwick*, Assistant Public Defender, 8 East Long Street, 11th Floor, Columbus, OH 43215 (For Defendant-Appellant).

DIANE V. GRENDALL, J.

{¶1} Defendant-appellant, Ralph E. Clark, appeals his conviction and sentence in the Ashtabula County Court of Common Pleas following the entry of a negotiated guilty plea of Aggravated Murder with Gun Specification. For the following reasons, we affirm Clark's conviction and reverse his sentence, in part, and remand this cause for re-sentencing in respect to the financial sanctions imposed.

{¶2} Early on the morning of May 7, 2005, Ashtabula Police Officers received a dispatch of a burglary in progress at 4227 Park Avenue, in Ashtabula, the

residence of Clark's estranged wife, Carolyn Clark. The police found Carolyn unconscious, severely beaten at the back of her head with the butt of a rifle. Carolyn died shortly after being transported to the Ashtabula County Medical Center. Clark was arrested later that day at his home on 1031 East Morgan Road, in Jefferson, Ohio.

{¶3} On May 13, 2005, Clark was indicted on one count of Aggravated Murder with Gun Specification, an unclassified felony in violation of R.C. 2903.01 and R.C. 2941.145, two counts of Murder with Gun Specification, unclassified felonies in violation of R.C. 2903.02 and R.C. 2941.145.

{¶4} On January 13, 2006, Clark signed a negotiated Plea of Guilty to Aggravated Murder with a Three Year Gun Specification, in violation of R.C. 2903.01 and R.C. 2941.145. The trial court dismissed a second specification to the Aggravated Murder charge and the two counts of Murder. In the plea agreement, Clark acknowledged "that the maximum penalty for the crime of aggravated murder is life imprisonment without parole *** and that the sentence for the three year gun specification shall be served consecutively to the sentence imposed for aggravated murder." The agreement further provides: "I may have a period of post-release control for five (5) years following my release from prison. If I violate a post-release control sanction imposed upon me, *** the Parole Board may impose *** a prison term, provided that the prison term cannot exceed nine months and the maximum cumulative prison term so imposed for all violations during the period of post-release control cannot exceed one-half of the stated prison term originally imposed upon me."

{¶5} At Clark's change of plea hearing, the prosecution and defense counsel jointly recommended a sentence of life imprisonment, with parole eligibility after

twenty-five years plus an additional three years for the Gun Specification. The trial judge, addressing Clark directly, explained: "if you're placed on post-release control and if you violate any of those conditions of post-release control, you'd be charged with a violation and you would have a hearing before the Parole Board, and if it were determined at that hearing that you had violated one or more conditions of your post-release control, you could have a new prison term imposed of up to nine months in duration; however, the total of all such new prison terms could not exceed one-half of your original sentence."

{¶6} On January 18, 2006, Clark's sentencing hearing was held. The trial court sentenced Clark to life imprisonment with eligibility for parole after twenty-eight years.¹ As to the circumstances of Clark's parole, the trial judge addressed Clark as follows: "Normally, we use a sentencing form at the Sentencing Hearing and it talks about post-release control. I'm going to use this form today and I'm going to read this form to you, but if the defendant were to be released, after 28 years, he would certainly be under certain conditions that they call parole, it's not called post-release control. But I'm going to use this form and I'm going to read it to you, Mr. Clark, because what's in this form would apply to you. If you're released from prison, and I'm going to change the word "after" to "if" because that's not a certainty. If you're released from prison, you will *** have a period of post-release control, or parole, for at least five years following your release from prison. If you violate a post-release controlled sanction imposed upon you *** the Parole Board may impose *** a prison term, provided that the prison term cannot exceed nine months, and the maximum

1. Clark was forty-four years old at the time of sentencing with 257 days jail credit for time served. Accordingly, he would be about seventy-three years old when he becomes eligible for parole.

cumulative prison term so imposed for all violations during the period of post-release control cannot exceed one-half of the stated prison term originally imposed upon you."

{¶7} The trial judge also addressed Clark regarding economic penalties as follows: "The Court is not going to impose any monetary fine. Under the law, the Court, if it imposes a fine, has to also make a finding that he's got the ability to pay the fine. Obviously, [Clark]'s going to spend the rest of his life behind bars. He won't have the ability to be employed. So, no fine will be imposed. There's been no request for restitution made. Obviously, he would not have the ability to make restitution either."

{¶8} In the trial court's written Judgment Entry of Sentence, the court stated that Clark "will be subject to a period of post-release control pursuant to R.C. 2929.14(F) and R.C. 2967.28(B) & (C). *** No monetary fine is imposed and no restitution is ordered. [Clark] is ordered to pay all prosecution costs, court-appointed counsel costs and any fees permitted pursuant to R.C. 2929.18(A)(4)."

{¶9} Clark has appealed the entry of his guilty plea and the trial court's imposition of economic penalties and raises the following assignments of error:

{¶10} "[1.] Ralph Clark's guilty plea was not knowing, voluntary, and intelligent because the trial court repeatedly misinformed him that he would be subject to a limited period of post-release control upon his release from prison.

{¶11} "[2.] The trial court erred when it ordered Mr. Clark to pay court-appointed-counsel fees without making the necessary ability-to-pay finding required by R.C. 2941.51(D).

{¶12} “[3.] The trial court erred when it ordered Mr. Clark to pay ‘any fees permitted pursuant to R.C. 2929.18(A)(4)’ without considering Mr. Clark’s ‘present and future ability to pay’ such fees, as required by R.C. 2929.19(B)(6).

{¶13} “[4.] The trial court erred when it included a punishment in the written sentencing judgment, but not in the sentence it imposed from the bench at the sentencing hearing.”

{¶14} Under the first assignment of error, Clark argues that the trial court mistakenly informed him that the maximum penalties that could be imposed for violating the terms of his Adult Parole Authority supervision were additional prison terms of nine months not exceeding one half of his original sentence. According to Clark, this erroneous information regarding the “maximum penalty” that could be imposed rendered his plea invalid, i.e. it was not knowingly, voluntarily, and intelligently made. We disagree.

{¶15} Contrary to Clark’s plea agreement and the comments made by the trial judge at the plea hearing, Clark is not subject to post-release control as detailed in R.C. 2967.28. Strictly speaking, the trial judge’s erroneous statements regarding post release control made at the sentencing hearing have no bearing on the validity of Clark’s plea. Post-release controls apply to classified felonies based on the degree of the felony. R.C. 2967.28(B) and (C). Aggravated murder is an unclassified felony to which the provisions of R.C. 2967.28 do not apply. *State v. Wotring*, 11th Dist. No. 99-L-114, 2003-Ohio-326, ¶¶33-36; *State v. Baker*, 1st Dist. No. C-050791, 2006-Ohio-4902, at ¶6. Accordingly, Clark was mistakenly advised that he could be subject to a period of post-release control for five years and that if he violated the

conditions of post release control, the parole board could impose a prison term not exceeding nine months. See R.C. 2967.28(B)(1) and (F)(3).

{¶16} The basic penalties for Aggravated Murder are either death or imprisonment for life. R.C. 2929.02(A). If the court imposes the penalty of imprisonment for life, the court may specify whether the offender shall be imprisoned for life "without parole" or whether the offender will be eligible for parole after serving twenty, twenty-five, or thirty "full years of imprisonment." R.C. 2929.03(A)(1).

{¶17} According to the sentence imposed by the trial court, Clark becomes eligible for parole "after serving a term of twenty-five full years," plus three additional years for the Gun Specification. R.C. 2967.13(A)(3) and (B); R.C. 2929.03(A)(1)(c). "Parole" means, regarding a prisoner who is serving a prison term for aggravated murder ***, a release of the prisoner from confinement in any state correctional institution by the adult parole authority *** under the terms and conditions, and for a period of time, prescribed by the authority ***." R.C. 2967.01(E). A "parolee" remains under the supervision of the adult parole authority and under the legal custody of the department of rehabilitation and correction until granted "final release." R.C. 2967.02(C); *In re Ricks* (Dec. 31, 1997), 11th Dist. No. 97-T-0182, 1997 Ohio App. LEXIS 6026, at *3 ("the courts of this state have consistently held that a parolee remains in the legal custody of the Ohio parole authority until a final release certificate is issued"). There is no fixed period of time within which the parole authority must grant a parolee final release. R.C. 2967.16.

{¶18} "There is no constitutional or inherent right to be released before the expiration of a valid sentence." *State ex rel. Miller v. Leonard*, 88 Ohio St.3d 46, 47, 2000-Ohio-267, citing *Greenholtz v. Inmates of Nebraska Penal & Correctional*

Complex (1979), 442 U.S. 1, 7. "[W]hether to *** grant parole, or to grant a final release from parole once granted, rests within the discretion of the Adult Parole Authority." *Poole v. Barkollo*, 10th Dist. No. 01AP-1249, 2002-Ohio-2300, at ¶6 (citations omitted); *State ex rel. Duganitz v. Ohio Adult Parole Auth.*, 77 Ohio St.3d 190, 192, 1996-Ohio-326 ("[e]ven if all of these requirements [for final release] are met, the APA's decision whether to grant final release is still discretionary").

{¶19} In contrast to an offender subject to post-release control pursuant to R.C. 2967.28 (technically called a "releasee," see R.C. 2967.01(J)), a parolee who violates the conditions of his parole "is returned to serve the remainder of his original sentence, not a new sentence." *In re Long* (1985), 24 Ohio App.3d 32, 36.

{¶20} The Ohio Rules of Criminal Procedure provide that a trial court "shall not accept a plea of guilty *** without first addressing the defendant personally and *** determining that the defendant is making the plea voluntarily, with understanding *** of the maximum penalty involved ***." Crim.R. 11(C)(2)(a). With respect to the non-constitutional requirements of Crim.R. 11(C)(2), such as whether the defendant understands the maximum penalty involved, a reviewing court must determine whether there was substantial compliance. *State v. Francis*, 104 Ohio St.3d 490, 2004-Ohio-6894, at ¶45. "Substantial compliance means that under the totality of the circumstances the defendant subjectively understands the implications of his plea and the rights he is waiving." *State v. Nero* (1990), 56 Ohio St.3d 106, 108, citing *State v. Stewart* (1977), 51 Ohio St.2d 86, 92-93.

{¶21} In contrast to post release control, parole is not part of an offender's sentence. The "maximum penalty" that could be imposed on Clark was imprisonment for life. Accordingly, the trial court was under no duty to explain to Clark the

circumstances of parole. *Hill v. Lockhart* (1985), 474 U.S. 52, 56 (“[w]e have never held that the United States Constitution requires the State to furnish a defendant with information about parole eligibility in order for the defendant’s plea of guilty to be voluntary”); *Xie v. Edwards* (C.A.6.1994), 6th Cir. No. 93-4385, 1994 U.S. App. LEXIS 23606, at *4 (“[p]arole eligibility is not a ‘direct consequence’ of a conviction, and a defendant need not be informed of it”) (citation omitted); *State v. Hamilton*, 4th Dist. No. 05CA4, 2005-Ohio-5450, at ¶13 (“[b]ecause parole is not part of an offender’s sentence, the maximum penalty [for aggravated murder] is imprisonment for life”); *State v. Prom*, 12th Dist. No. CA2002-01-007, 2003-Ohio-6543, ¶27 (“the court was [not] required to give Prom any advice at all concerning parole *** and courts rarely if ever do”).

{¶22} Clark relies on the Twelfth District case of *State v. Prom*, in which the offender pled guilty to murder and was mistakenly advised of post release control rather than parole. The Twelfth District, although acknowledging that the trial court was under no obligation to advise the offender regarding parole, found that “by delving into these inapplicable post-release control penalties in a mistaken effort to comply with Crim.R. 11(C), *** the court inadvertently created a Crim.R. 11(C) problem.” 2003-Ohio-6543, at ¶27. The court of appeals reasoned, “[s]ubstantial compliance might arise out of an omission, but it’s far more difficult to find with respect to an affirmative misstatement, especially one that understates the penalty involved.” *Id.* at ¶28. Thus, the court concluded “that the trial court erred when it accepted Prom’s guilty plea when, in consequence of the court’s erroneous advice to her concerning post-release control, Prom necessarily was unaware of the maximum penalty to which she was exposed by her plea.” *Id.* ¶29.

{¶23} We do not find *Prom* persuasive. The *Prom* court bases its conclusion on the offender being "unaware of the maximum penalty to which she was exposed by her plea," however, eligibility for parole as well as the terms and conditions of parole were neither part of her sentence nor part of the maximum penalty to which she was exposed.

{¶24} The Fourth District in *State v. Hamilton* rejected the conclusion reached in *Prom*. As in the present case, the offender in *Hamilton* had pled guilty to Aggravated Murder and was erroneously advised of the penalties for violating post release control. 2005-Ohio-5450, at ¶1. The Fourth District reasoned, "nothing in the court's misstatement about post-release control indicated that Hamilton would be or was entitled to early release. The maximum penalty remained life in prison. Hamilton is not subject to any greater penalty than the court described. The court's inaccurate minimization of the sanction for violating a totally discretionary early release does not change the maximum penalty Hamilton faces. Hamilton may well have been misled about how much time he would serve for violating parole, but his contention that he did not know the maximum penalty he faced for aggravated murder rings hollow." *Id.* at ¶18.

{¶25} The *Prom* decision has also been rejected by the First Appellate District in *State v. Baker*, 2006-Ohio-4902, for the similar. *Id.* at syllabus ("When the trial court mistakenly informed a defendant convicted of murder that the defendant could be placed on a period of post-release control, the defendant's guilty plea was not rendered involuntary under Crim.R. 11(C)(2)(a): The trial court's mistake in no way

detracted from the defendant's understanding that the maximum penalty he faced was life in prison.”).²

{¶26} In the present case, as correctly stated by the trial judge at the plea hearing, the maximum penalty that could be imposed upon Clark was life without parole. Clark's actual sentence of life with eligibility for parole after twenty-five years was jointly recommended, but, as the trial judge made clear, the court was not bound to accept this recommendation. Accordingly, the trial court substantially complied with Crim.R. 11(C)(2)(a)'s requirement to explain the maximum penalty, notwithstanding the court's erroneous explanation of the lesser penalty of life with eligibility for parole.

{¶27} The inquiry, however, does not end with the determination as to whether the sentencing judge complied with Crim.R. 11(C)(2)(a). “[A] defendant who challenges his guilty plea on the basis that it was not knowingly, intelligently, and voluntarily made must show a prejudicial effect. *** The test is whether the plea would have otherwise been made.” *Nero*, 56 Ohio St.3d at 108, citing *Stewart*, 51 Ohio St.2d at 93, and Crim.R. 52(A).

{¶28} In the present case, there is no evidence that would suggest Clark's belief that he would be subject to post release control, assuming he would be released after twenty-eight years, induced him to enter his plea of guilty. On the contrary, the prosecution possessed a video-taped statement, two recorded statements, and an oral statement in which Clark fully admitted his culpability for Carolyn's death. Clark's motion to have these confessions suppressed was denied.

2. The Ohio Supreme Court declined to accept *Baker* as a discretionary appeal. *State v. Baker*, 112 Ohio St.3d 1471, 2007-Ohio-388. As to *Hamilton*, the Supreme Court denied a motion to file a delayed appeal. *State v. Hamilton*, 112 Ohio St.3d 1417, 2006-Ohio-6712.

Moreover, Clark had been determined competent to stand trial and to have known the wrongfulness of his acts. As Clark's guilt was not reasonably in the question, the only issue for the court was whether Clark's sentence would be life imprisonment or life imprisonment with the possibility of parole. In exchange for the plea of guilty, the State agreed to recommend a sentence of life with eligibility for parole after twenty-five years. As discussed above, post release control is not applicable in murder cases. Clark cannot demonstrate prejudice by being misinformed about the possibility of post release control sanctions when such sanctions are not a possibility under any circumstances. Thus, parole remains the only possible alternative to life imprisonment without parole. Since parole is the only alternative of life imprisonment, the actual conditions of parole cannot have been a significant factor in Clark's decision to enter a plea. Cf. *State v. Mitchell*, 11th Dist. No. 2004-T-0139, 2006-Ohio-618, at ¶16 (defendant's mistaken belief about the "possibility" of early judicial release did not satisfy the prejudice requirement necessary to invalidate the guilty plea).

{¶29} The late Judge Kilbane, in a separate concurring opinion in *State v. Cvijetinovic*, 8th Dist. No. 81534, 2003-Ohio-563, provides a perceptive analysis of the difficulty of demonstrating prejudice in a direct appeal of a plea agreement: "I agree that the record on appeal is insufficient to set aside the plea because there is no indication that Cvijetinovic relied on the judge's statements to his prejudice. These circumstances, however, are not unusual because the substantial compliance rule tends to defeat most guilty plea challenges on appeal unless prejudice is shown in the transcript of the plea hearing or the violation does not require a showing of prejudice. Where the record on appeal shows substantial compliance, the defendant

still may challenge his plea through Crim.R. 32.1 if he can present evidence showing that he did not have the necessary subjective understanding of the plea's consequences." Id. at ¶23 (citations omitted).

¶30} The first assignment of error is without merit.

¶31} The next three assignments of error challenge the trial court's imposition of financial penalties and may be considered together.

¶32} Under the Revised Code, "[t]he court shall not impose a fine or fines for aggravated murder which *** exceeds the amount which the offender is or will be able to pay by the method and within the time allowed without undue hardship to the offender or to the dependents of the offender, or will prevent the offender from making reparation for the victim's wrongful death." R.C. 2929.02(C).

¶33} At Clark's sentencing hearing, the trial court ordered Clark to "pay court costs, for which judgment is rendered and execution may issue." In its written Judgment Entry of Sentence, the trial court stated; "[n]o monetary fine is imposed and no restitution is ordered. [Clark] is ordered to pay all prosecution costs, court-appointed counsel costs, and any fees permitted pursuant to R.C. 2929.18(A)(4)."

¶34} Clark argues that the order to pay court-appointed counsel fees and any fees permitted pursuant to R.C. 2929.18(A)(4) is improper because (1) the trial court failed to state that it was imposing these penalties at the sentencing hearing and (2) the trial court failed to inquire into Clark's ability to pay these fees.

¶35} Ohio Criminal Rule 43(A) provides "[t]he defendant shall be present at the arraignment and every stage of the trial, including *** the imposition of sentence." Thus, the defendant must be present when sentence is imposed and a trial court errs when it imposes additional sanctions, including mandatory court costs, in its

sentencing entry outside the defendant's presence. *State v. Peacock*, 11th Dist. No. 2002-L-115, 2003-Ohio-6772, at ¶45 ("Crim.R. 43(A) requires the trial court to inform the defendant, at his sentencing hearing, *** that he is required to pay costs[;] [s]imply adding these sanctions in the sentencing entry violates Crim.R. 43(A)").

{¶36} The State concedes the trial court erred by including additional sanctions in its sentencing entry that were not imposed at the hearing. Accordingly, that part of the court's Judgment Entry of Sentence, ordering Clark "to pay all prosecution costs, court-appointed counsel costs and any fees permitted pursuant to R.C. 2929.18(A)(4)," must be vacated. The fourth assignment of error has merit.

{¶37} Under the second assignment of error, Clark challenges the trial court's ability to impose "court-appointed counsel costs" when the court has not inquired into the offender's ability to pay. There exists some ambiguity as to what the trial court meant by "court-appointed counsel costs."

{¶38} Clark interprets "court-appointed counsel costs" to mean the costs of appointed counsel. Pursuant to R.C. 2941.51, governing the payment of appointed counsel, "if the person represented has, or reasonably may be expected to have, the means to meet some part of the cost of the services rendered to the person, the person shall pay the county an amount that the person reasonably can be expected to pay." R.C. 2941.51(D). A trial court is required to make a finding on the record regarding an offender's ability to pay appointed counsel fees before assessing the costs of appointed counsel. *State v. Berry*, 6th Dist. No. L-05-1048, 2007-Ohio-94, at ¶56.

{¶39} The State interprets "court-appointed counsel costs" to mean the twenty-five dollar application fee for indigent defendants. Pursuant to R.C. 120.36, "if

a person who is a defendant in a criminal case *** requests or is provided a state public defender *** or any other counsel appointed by the court, the court in which the criminal case is initially filed *** shall assess, unless the application fee is waived or reduced, a non-refundable application fee of twenty-five dollars. *** If the person does not pay the application fee within [a] seven-day period, the court shall assess the application fee at sentencing or at the final disposition of the case." R.C. 120.36(A)(1).

{¶40} At sentencing, the trial court stated, "[t]he Court is not going to impose any monetary fine. Under the law, the Court, if it imposes a fine, has to also make a finding that he's got the ability to pay the fine. Obviously, [Clark]'s going to spend the rest of his life behind bars. He won't have the ability to be employed. So, no fine will be imposed."

{¶41} These comments are consistent with the State's, rather than Clark's, interpretation of what the trial court meant by "court-appointed counsel costs." Far from finding that Clark "has, or reasonably may be expected to have, the means to meet some of the costs of appointed counsel, the trial court concluded that Clark does not and will not have the ability to pay additional fines. Accordingly, the trial court's reference to "court-appointed counsel costs" can only be reasonably interpreted to mean the twenty-five dollar application fee for indigent defendants. However, since the trial court failed to assess this fee at the time of sentencing, this part of Clark's sentence remains vacated. The second assignment of error has merit for the reasons set forth under the fourth assignment of error, i.e. "court-appointed counsel costs" were not pronounced at the sentencing hearing.

{¶42} Under the third assignment of error, Clark challenges the trial court's order that he pay "any fees permitted pursuant to R.C. 2929.18(A)(4)." Pursuant to R.C. 2929.18(A)(4), the trial court may order Clark to pay "[a] state fine or costs as defined in section 2949.111 of the Revised Code." "State fines or costs" means any costs imposed or forfeited bail collected by the court *** for deposit into the reparations fund or *** for deposit into the general revenue fund and all fines, penalties, and forfeited bail collected by the court and paid to a law library association ***." R.C. 2949.111(A)(2). "Before imposing a financial sanction under section 2929.18 of the Revised Code ***, the court shall consider the offender's present and future ability to pay the amount of the sanction or fine." R.C. 2929.19(B)(6).

{¶43} The State concedes the trial court did not comply with R.C. 2929.19(B)(6) by not considering Clark's future ability to pay fees pursuant to R.C. 2929.18(A)(4).

{¶44} As discussed under the second assignment of error, this part of Clark's sentence must be vacated as the trial court did not assess fees pursuant to R.C. 2929.18(A)(4) at the time of sentencing. We further note that it does not appear from the record that any "state fines or costs," as defined in 2949.111(A)(2), presently exist. Accordingly, the third assignment of error has merit.

{¶45} For the foregoing reasons, we affirm the Ashtabula County Court of Common Pleas' Judgment Entry of Guilty to Negotiated Plea, accepting Clark's guilty plea to one count of Aggravated Murder with Gun Specification. We reverse the court's Judgment Entry of Sentence as to the financial penalties contained in the

written entry and imposed outside of Clark's presence. This matter is remanded for the limited purpose of resentencing consistent with Crim.R. 43(A) and this opinion.

MARY JANE TRAPP, J., concurs,

WILLIAM M. O'NEILL, J., dissents.

LEXSTAT O.R.C. 2901.02

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*** CURRENT THROUGH LEGISLATION PASSED BY THE 127TH OHIO GENERAL ASSEMBLY AND FILED
WITH THE SECRETARY OF STATE THROUGH NOVEMBER 8, 2007 ***

*** ANNOTATIONS CURRENT THROUGH SEPTEMBER 1, 2007 ***

*** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH NOVEMBER 4, 2007 ***

TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2901. GENERAL PROVISIONS
IN GENERAL

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ORC Ann. 2901.02 (2007)

§ 2901.02. Classification of offenses

As used in the Revised Code:

(A) Offenses include aggravated murder, murder, felonies of the first, second, third, fourth, and fifth degree, misdemeanors of the first, second, third, and fourth degree, minor misdemeanors, and offenses not specifically classified.

(B) Aggravated murder when the indictment or the count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of *section 2929.04 of Revised Code*, and any other offense for which death may be imposed as a penalty, is a capital offense.

(C) Aggravated murder and murder are felonies.

(D) Regardless of the penalty that may be imposed, any offense specifically classified as a felony is a felony, and any offense specifically classified as a misdemeanor is a misdemeanor.

(E) Any offense not specifically classified is a felony if imprisonment for more than one year may be imposed as a penalty.

(F) Any offense not specifically classified is a misdemeanor if imprisonment for not more than one year may be imposed as a penalty.

(G) Any offense not specifically classified is a minor misdemeanor if the only penalty that may be imposed is one of the following:

(1) For an offense committed prior to the effective date of this amendment, a fine not exceeding one hundred dollars;

(2) For an offense committed on or after the effective date of this amendment, a fine not exceeding one hundred fifty dollars, community service under division (C) of *section 2929.27 of the Revised Code*, or a financial sanction other than a fine under *section 2929.28 of the Revised Code*.

LEXSTAT O.R.C. 2903.01

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TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2903. HOMICIDE AND ASSAULT
HOMICIDE

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ORC Ann. 2903.01 (2007)

§ 2903.01. Aggravated murder

(A) No person shall purposely, and with prior calculation and design, cause the death of another or the unlawful termination of another's pregnancy.

(B) No person shall purposely cause the death of another or the unlawful termination of another's pregnancy while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit, kidnapping, rape, aggravated arson, arson, aggravated robbery, robbery, aggravated burglary, burglary, terrorism, or escape.

(C) No person shall purposely cause the death of another who is under thirteen years of age at the time of the commission of the offense.

(D) No person who is under detention as a result of having been found guilty of or having pleaded guilty to a felony or who breaks that detention shall purposely cause the death of another.

(E) No person shall purposely cause the death of a law enforcement officer whom the offender knows or has reasonable cause to know is a law enforcement officer when either of the following applies:

- (1) The victim, at the time of the commission of the offense, is engaged in the victim's duties.
- (2) It is the offender's specific purpose to kill a law enforcement officer.

(F) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in *section 2929.02 of the Revised Code*.

(G) As used in this section:

- (1) "Detention" has the same meaning as in *section 2921.01 of the Revised Code*.
- (2) "Law enforcement officer" has the same meaning as in *section 2911.01 of the Revised Code*.

LEXSTAT O.R.C. 2903.02

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TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2903. HOMICIDE AND ASSAULT
HOMICIDE

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ORC Ann. 2903.02 (2007)

§ 2903.02. Murder

(A) No person shall purposely cause the death of another or the unlawful termination of another's pregnancy.

(B) No person shall cause the death of another as a proximate result of the offender's committing or attempting to commit an offense of violence that is a felony of the first or second degree and that is not a violation of *section 2903.03* or *2903.04 of the Revised Code*.

(C) Division (B) of this section does not apply to an offense that becomes a felony of the first or second degree only if the offender previously has been convicted of that offense or another specified offense.

(D) Whoever violates this section is guilty of murder, and shall be punished as provided in *section 2929.02 of the Revised Code*.

LEXSTAT O.R.C. 2929.02

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*** CURRENT THROUGH LEGISLATION PASSED BY THE 127TH OHIO GENERAL ASSEMBLY AND FILED
WITH THE SECRETARY OF STATE THROUGH NOVEMBER 8, 2007 ***

*** ANNOTATIONS CURRENT THROUGH SEPTEMBER 1, 2007 ***

*** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH NOVEMBER 4, 2007 ***

TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2929. PENALTIES AND SENTENCING
PENALTIES FOR MURDER

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ORC Ann. 2929.02 (2007)

THIS SECTION HAS MORE THAN ONE DOCUMENT WITH VARYING EFFECTIVE DATES.

§ 2929.02. Penalties for aggravated murder or murder

(A) Whoever is convicted of or pleads guilty to aggravated murder in violation of *section 2903.01 of the Revised Code* shall suffer death or be imprisoned for life, as determined pursuant to *sections 2929.022 [2929.02.2], 2929.03, and 2929.04 of the Revised Code*, except that no person who raises the matter of age pursuant to *section 2929.023 [2929.02.3] of the Revised Code* and who is not found to have been eighteen years of age or older at the time of the commission of the offense shall suffer death. In addition, the offender may be fined an amount fixed by the court, but not more than twenty-five thousand dollars.

(B) (1) Except as otherwise provided in division (B)(2) or (3) of this section, whoever is convicted of or pleads guilty to murder in violation of *section 2903.02 of the Revised Code* shall be imprisoned for an indefinite term of fifteen years to life.

(2) Except as otherwise provided in division (B)(3) of this section, if a person is convicted of or pleads guilty to murder in violation of *section 2903.02 of the Revised Code*, the victim of the offense was less than thirteen years of age, and the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or information charging the offense, the court shall impose an indefinite prison term of thirty years to life pursuant to division (B)(3) of *section 2971.03 of the Revised Code*.

(3) If a person is convicted of or pleads guilty to murder in violation of *section 2903.02 of the Revised Code* and also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that were included in the indictment, count in the indictment, or information that charged the murder, the court shall impose upon the offender a term of life imprisonment without parole that shall be served pursuant to *section 2971.03 of the Revised Code*.

(4) In addition, the offender may be fined an amount fixed by the court, but not more than fifteen thousand dollars.

(C) The court shall not impose a fine or fines for aggravated murder or murder which, in the aggregate and to the extent not suspended by the court, exceeds the amount which the offender is or will be able to pay by the method and within the time allowed without undue hardship to the offender or to the dependents of the offender, or will prevent the offender from making reparation for the victim's wrongful death.

(D) (1) In addition to any other sanctions imposed for a violation of *section 2903.01* or *2903.02* of the *Revised Code*, if the offender used a motor vehicle as the means to commit the violation, the court shall impose upon the offender a class two suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege as specified in division (A)(2) of *section 4510.02* of the *Revised Code*.

(2) As used in division (D) of this section, "motor vehicle" has the same meaning as in *section 4501.01* of the *Revised Code*.

LEXSTAT O.R.C. 2929.14

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TITLE 29. CRIMES -- PROCEDURE
 CHAPTER 2929. PENALTIES AND SENTENCING
 PENALTIES FOR FELONY

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ORC Ann. 2929.14 (2007)

THIS SECTION HAS MORE THAN ONE DOCUMENT WITH VARYING EFFECTIVE DATES.

§ 2929.14. Basic prison terms

(A) Except as provided in division (C), (D)(1), (D)(2), (D)(3), (D)(4), (D)(5), (D)(6), (G), or (L) of this section and except in relation to an offense for which a sentence of death or life imprisonment is to be imposed, if the court imposing a sentence upon an offender for a felony elects or is required to impose a prison term on the offender pursuant to this chapter, the court shall impose a definite prison term that shall be one of the following:

- (1) For a felony of the first degree, the prison term shall be three, four, five, six, seven, eight, nine, or ten years.
- (2) For a felony of the second degree, the prison term shall be two, three, four, five, six, seven, or eight years.
- (3) For a felony of the third degree, the prison term shall be one, two, three, four, or five years.
- (4) For a felony of the fourth degree, the prison term shall be six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, or eighteen months.
- (5) For a felony of the fifth degree, the prison term shall be six, seven, eight, nine, ten, eleven, or twelve months.

(B) Except as provided in division (C), (D)(1), (D)(2), (D)(3), (D)(5), (D)(6), (G), or (L) of this section, in *section 2907.02 or 2907.05 of the Revised Code*, or in Chapter 2925. of the Revised Code, if the court imposing a sentence upon an offender for a felony elects or is required to impose a prison term on the offender, the court shall impose the shortest prison term authorized for the offense pursuant to division (A) of this section, unless one or more of the following applies:

- (1) The offender was serving a prison term at the time of the offense, or the offender previously had served a prison term.
- (2) The court finds on the record that the shortest prison term will demean the seriousness of the offender's conduct or will not adequately protect the public from future crime by the offender or others.

(C) Except as provided in division (G) or (L) of this section or in Chapter 2925. of the Revised Code, the court imposing a sentence upon an offender for a felony may impose the longest prison term authorized for the offense pursuant to division (A) of this section only upon offenders who committed the worst forms of the offense, upon offenders who pose the greatest likelihood of committing future crimes, upon certain major drug offenders under division (D)(3) of this section, and upon certain repeat violent offenders in accordance with division (D)(2) of this section.

(D) (1) (a) Except as provided in division (D)(1)(e) of this section, if an offender who is convicted of or pleads guilty to a felony also is convicted of or pleads guilty to a specification of the type described in *section 2941.141 [2941.14.1]*, *2941.144 [2941.14.4]*, or *2941.145 [2941.14.5]* of the Revised Code, the court shall impose on the offender one of the following prison terms:

(i) A prison term of six years if the specification is of the type described in *section 2941.144 [2941.14.4]* of the Revised Code that charges the offender with having a firearm that is an automatic firearm or that was equipped with a firearm muffler or silencer on or about the offender's person or under the offender's control while committing the felony;

(ii) A prison term of three years if the specification is of the type described in *section 2941.145 [2941.14.5]* of the Revised Code that charges the offender with having a firearm on or about the offender's person or under the offender's control while committing the offense and displaying the firearm, brandishing the firearm, indicating that the offender possessed the firearm, or using it to facilitate the offense;

(iii) A prison term of one year if the specification is of the type described in *section 2941.141 [2941.14.1]* of the Revised Code that charges the offender with having a firearm on or about the offender's person or under the offender's control while committing the felony.

(b) If a court imposes a prison term on an offender under division (D)(1)(a) of this section, the prison term shall not be reduced pursuant to section 2929.20, section 2967.193 [2967.19.3], or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. A court shall not impose more than one prison term on an offender under division (D)(1)(a) of this section for felonies committed as part of the same act or transaction.

(c) Except as provided in division (D)(1)(e) of this section, if an offender who is convicted of or pleads guilty to a violation of *section 2923.161 [2923.16.1]* of the Revised Code or to a felony that includes, as an essential element, purposely or knowingly causing or attempting to cause the death of or physical harm to another, also is convicted of or pleads guilty to a specification of the type described in *section 2941.146 [2941.14.6]* of the Revised Code that charges the offender with committing the offense by discharging a firearm from a motor vehicle other than a manufactured home, the court, after imposing a prison term on the offender for the violation of *section 2923.161 [2923.16.1]* of the Revised Code or for the other felony offense under division (A), (D)(2), or (D)(3) of this section, shall impose an additional prison term of five years upon the offender that shall not be reduced pursuant to section 2929.20, section 2967.193 [2967.19.3], or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. A court shall not impose more than one additional prison term on an offender under division (D)(1)(c) of this section for felonies committed as part of the same act or transaction. If a court imposes an additional prison term on an offender under division (D)(1)(c) of this section relative to an offense, the court also shall impose a prison term under division (D)(1)(a) of this section relative to the same offense, provided the criteria specified in that division for imposing an additional prison term are satisfied relative to the offender and the offense.

(d) If an offender who is convicted of or pleads guilty to an offense of violence that is a felony also is convicted of or pleads guilty to a specification of the type described in *section 2941.1411 [2941.14.11]* of the Revised Code that charges the offender with wearing or carrying body armor while committing the felony offense of violence, the court shall impose on the offender a prison term of two years. The prison term so imposed shall not be reduced pursuant to section 2929.20, section 2967.193 [2967.19.3], or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. A court shall not impose more than one prison term on an offender under division (D)(1)(d) of this section for felonies committed as part of the same act or transaction. If a court imposes an additional prison term under division (D)(1)(a) or (c) of this section, the court is not precluded from imposing an additional prison term under division (D)(1)(d) of this section.

(e) The court shall not impose any of the prison terms described in division (D)(1)(a) of this section or any of the additional prison terms described in division (D)(1)(c) of this section upon an offender for a violation of *section 2923.12 or 2923.123 [2923.12.3]* of the Revised Code. The court shall not impose any of the prison terms described in division (D)(1)(a) of this section or any of the additional prison terms described in division (D)(1)(c) of this section upon an offender for a violation of *section 2923.13 of the Revised Code* unless all of the following apply:

(i) The offender previously has been convicted of aggravated murder, murder, or any felony of the first or second degree.

(ii) Less than five years have passed since the offender was released from prison or post-release control, whichever is later, for the prior offense.

(f) If an offender is convicted of or pleads guilty to a felony that includes, as an essential element, causing or attempting to cause the death of or physical harm to another and also is convicted of or pleads guilty to a specification of the type described in *section 2941.1412 [2941.14.12] of the Revised Code* that charges the offender with committing the offense by discharging a firearm at a peace officer as defined in *section 2935.01 of the Revised Code* or a corrections officer as defined in *section 2941.1412 [2941.14.12] of the Revised Code*, the court, after imposing a prison term on the offender for the felony offense under division (A), (D)(2), or (D)(3) of this section, shall impose an additional prison term of seven years upon the offender that shall not be reduced pursuant to *section 2929.20, section 2967.193 [2967.19.3]*, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. A court shall not impose more than one additional prison term on an offender under division (D)(1)(f) of this section for felonies committed as part of the same act or transaction. If a court imposes an additional prison term on an offender under division (D)(1)(f) of this section relative to an offense, the court shall not impose a prison term under division (D)(1)(a) or (c) of this section relative to the same offense.

(2) (a) If division (D)(2)(b) of this section does not apply, the court may impose on an offender, in addition to the longest prison term authorized or required for the offense, an additional definite prison term of one, two, three, four, five, six, seven, eight, nine, or ten years if all of the following criteria are met:

(i) The offender is convicted of or pleads guilty to a specification of the type described in *section 2941.149 [2941.14.9] of the Revised Code* that the offender is a repeat violent offender.

(ii) The offense of which the offender currently is convicted or to which the offender currently pleads guilty is aggravated murder and the court does not impose a sentence of death or life imprisonment without parole, murder, terrorism and the court does not impose a sentence of life imprisonment without parole, any felony of the first degree that is an offense of violence and the court does not impose a sentence of life imprisonment without parole, or any felony of the second degree that is an offense of violence and the trier of fact finds that the offense involved an attempt to cause or a threat to cause serious physical harm to a person or resulted in serious physical harm to a person.

(iii) The court imposes the longest prison term for the offense that is not life imprisonment without parole.

(iv) The court finds that the prison terms imposed pursuant to division (D)(2)(a)(iii) of this section and, if applicable, division (D)(1) or (3) of this section are inadequate to punish the offender and protect the public from future crime, because the applicable factors under *section 2929.12 of the Revised Code* indicating a greater likelihood of recidivism outweigh the applicable factors under that section indicating a lesser likelihood of recidivism.

(v) The court finds that the prison terms imposed pursuant to division (D)(2)(a)(iii) of this section and, if applicable, division (D)(1) or (3) of this section are demeaning to the seriousness of the offense, because one or more of the factors under *section 2929.12 of the Revised Code* indicating that the offender's conduct is more serious than conduct normally constituting the offense are present, and they outweigh the applicable factors under that section indicating that the offender's conduct is less serious than conduct normally constituting the offense.

(b) The court shall impose on an offender the longest prison term authorized or required for the offense and shall impose on the offender an additional definite prison term of one, two, three, four, five, six, seven, eight, nine, or ten years if all of the following criteria are met:

(i) The offender is convicted of or pleads guilty to a specification of the type described in *section 2941.149 [2941.14.9] of the Revised Code* that the offender is a repeat violent offender.

(ii) The offender within the preceding twenty years has been convicted of or pleaded guilty to three or more offenses described in division (DD)(1) of *section 2929.01 of the Revised Code*, including all offenses described in that division of which the offender is convicted or to which the offender pleads guilty in the current prosecution and all offenses described in that division of which the offender previously has been convicted or to which the offender previously pleaded guilty, whether prosecuted together or separately.

(iii) The offense or offenses of which the offender currently is convicted or to which the offender currently pleads guilty is aggravated murder and the court does not impose a sentence of death or life imprisonment without parole, murder, terrorism and the court does not impose a sentence of life imprisonment without parole, any felony of the first degree that is an offense of violence and the court does not impose a sentence of life imprisonment without parole, or any felony of the second degree that is an offense of violence and the trier of fact finds that the offense involved an attempt to cause or a threat to cause serious physical harm to a person or resulted in serious physical harm to a person.

(c) For purposes of division (D)(2)(b) of this section, two or more offenses committed at the same time or as part of the same act or event shall be considered one offense, and that one offense shall be the offense with the greatest penalty.

(d) A sentence imposed under division (D)(2)(a) or (b) of this section shall not be reduced pursuant to section 2929.20 or section 2967.193 [2967.19.3], or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. The offender shall serve an additional prison term imposed under this section consecutively to and prior to the prison term imposed for the underlying offense.

(e) When imposing a sentence pursuant to division (D)(2)(a) or (b) of this section, the court shall state its findings explaining the imposed sentence.

(3) (a) Except when an offender commits a violation of *section 2903.01 or 2907.02 of the Revised Code* and the penalty imposed for the violation is life imprisonment or commits a violation of *section 2903.02 of the Revised Code*, if the offender commits a violation of *section 2925.03 or 2925.11 of the Revised Code* and that section classifies the offender as a major drug offender and requires the imposition of a ten-year prison term on the offender, if the offender commits a felony violation of *section 2925.02, 2925.04, 2925.05, 2925.36, 3719.07, 3719.08, 3719.16, 3719.161 [3719.16.1], 4729.37, or 4729.61, division (C) or (D) of section 3719.172 [3719.17.2], division (C) of section 4729.51, or division (J) of section 4729.54 of the Revised Code* that includes the sale, offer to sell, or possession of a schedule I or II controlled substance, with the exception of marihuana, and the court imposing sentence upon the offender finds that the offender is guilty of a specification of the type described in *section 2941.1410 [2941.14.10] of the Revised Code* charging that the offender is a major drug offender, if the court imposing sentence upon an offender for a felony finds that the offender is guilty of corrupt activity with the most serious offense in the pattern of corrupt activity being a felony of the first degree, or if the offender is guilty of an attempted violation of *section 2907.02 of the Revised Code* and, had the offender completed the violation of *section 2907.02 of the Revised Code* that was attempted, the offender would have been subject to a sentence of life imprisonment or life imprisonment without parole for the violation of *section 2907.02 of the Revised Code*, the court shall impose upon the offender for the felony violation a ten-year prison term that cannot be reduced pursuant to section 2929.20 or Chapter 2967. or 5120. of the Revised Code.

(b) The court imposing a prison term on an offender under division (D)(3)(a) of this section may impose an additional prison term of one, two, three, four, five, six, seven, eight, nine, or ten years, if the court, with respect to the term imposed under division (D)(3)(a) of this section and, if applicable, divisions (D)(1) and (2) of this section, makes both of the findings set forth in divisions (D)(2)(a)(iv) and (v) of this section.

(4) If the offender is being sentenced for a third or fourth degree felony OVI offense under division (G)(2) of *section 2929.13 of the Revised Code*, the sentencing court shall impose upon the offender a mandatory prison term in accordance with that division. In addition to the mandatory prison term, if the offender is being sentenced for a fourth degree felony OVI offense, the court, notwithstanding division (A)(4) of this section, may sentence the offender to a definite prison term of not less than six months and not more than thirty months, and if the offender is being sentenced for a third degree felony OVI offense, the sentencing court may sentence the offender to an additional prison term of any duration specified in division (A)(3) of this section. In either case, the additional prison term imposed shall be reduced by the sixty or one hundred twenty days imposed upon the offender as the mandatory prison term. The total of the additional prison term imposed under division (D)(4) of this section plus the sixty or one hundred twenty days imposed as the mandatory prison term shall equal a definite term in the range of six months to thirty months for a fourth degree felony OVI offense and shall equal one of the authorized prison terms specified in division (A)(3) of this section for a third degree felony OVI offense. If the court imposes an additional prison term under division (D)(4) of this section, the offender shall serve the additional prison term after the offender has served the mandatory prison term required for the offense. In addition to the mandatory prison term or mandatory and additional prison term imposed as described in division (D)(4) of this section, the court also may sentence the offender to a community control sanction under *section 2929.16 or 2929.17 of the Revised Code*, but the offender shall serve all of the prison terms so imposed prior to serving the community control sanction.

If the offender is being sentenced for a fourth degree felony OVI offense under division (G)(1) of *section 2929.13 of the Revised Code* and the court imposes a mandatory term of local incarceration, the court may impose a prison term as described in division (A)(1) of that section.

(5) If an offender is convicted of or pleads guilty to a violation of division (A)(1) or (2) of *section 2903.06 of the Revised Code* and also is convicted of or pleads guilty to a specification of the type described in *section 2941.1414 [2941.14.14] of the Revised Code* that charges that the victim of the offense is a peace officer, as defined in *section*

2935.01 of the Revised Code, or an investigator of the bureau of criminal identification and investigation, as defined in section 2903.11 of the Revised Code, the court shall impose on the offender a prison term of five years. If a court imposes a prison term on an offender under division (D)(5) of this section, the prison term shall not be reduced pursuant to section 2929.20, section 2967.193 [2967.19.3], or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. A court shall not impose more than one prison term on an offender under division (D)(5) of this section for felonies committed as part of the same act.

(6) If an offender is convicted of or pleads guilty to a violation of division (A)(1) or (2) of section 2903.06 of the Revised Code and also is convicted of or pleads guilty to a specification of the type described in section 2941.1415 [2941.14.15] of the Revised Code that charges that the offender previously has been convicted of or pleaded guilty to three or more violations of division (A) or (B) of section 4511.19 of the Revised Code or an equivalent offense, as defined in section 2941.1415 [2941.14.15] of the Revised Code, or three or more violations of any combination of those divisions and offenses, the court shall impose on the offender a prison term of three years. If a court imposes a prison term on an offender under division (D)(6) of this section, the prison term shall not be reduced pursuant to section 2929.20, section 2967.193 [2967.19.3], or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. A court shall not impose more than one prison term on an offender under division (D)(6) of this section for felonies committed as part of the same act.

(E) (1) (a) Subject to division (E)(1)(b) of this section, if a mandatory prison term is imposed upon an offender pursuant to division (D)(1)(a) of this section for having a firearm on or about the offender's person or under the offender's control while committing a felony, if a mandatory prison term is imposed upon an offender pursuant to division (D)(1)(c) of this section for committing a felony specified in that division by discharging a firearm from a motor vehicle, or if both types of mandatory prison terms are imposed, the offender shall serve any mandatory prison term imposed under either division consecutively to any other mandatory prison term imposed under either division or under division (D)(1)(d) of this section, consecutively to and prior to any prison term imposed for the underlying felony pursuant to division (A), (D)(2), or (D)(3) of this section or any other section of the Revised Code, and consecutively to any other prison term or mandatory prison term previously or subsequently imposed upon the offender.

(b) If a mandatory prison term is imposed upon an offender pursuant to division (D)(1)(d) of this section for wearing or carrying body armor while committing an offense of violence that is a felony, the offender shall serve the mandatory term so imposed consecutively to any other mandatory prison term imposed under that division or under division (D)(1)(a) or (c) of this section, consecutively to and prior to any prison term imposed for the underlying felony under division (A), (D)(2), or (D)(3) of this section or any other section of the Revised Code, and consecutively to any other prison term or mandatory prison term previously or subsequently imposed upon the offender.

(c) If a mandatory prison term is imposed upon an offender pursuant to division (D)(1)(f) of this section, the offender shall serve the mandatory prison term so imposed consecutively to and prior to any prison term imposed for the underlying felony under division (A), (D)(2), or (D)(3) of this section or any other section of the Revised Code, and consecutively to any other prison term or mandatory prison term previously or subsequently imposed upon the offender.

(2) If an offender who is an inmate in a jail, prison, or other residential detention facility violates section 2917.02, 2917.03, 2921.34, or 2921.35 of the Revised Code, if an offender who is under detention at a detention facility commits a felony violation of section 2923.131 [2923.13.1] of the Revised Code, or if an offender who is an inmate in a jail, prison, or other residential detention facility or is under detention at a detention facility commits another felony while the offender is an escapee in violation of section 2921.34 of the Revised Code, any prison term imposed upon the offender for one of those violations shall be served by the offender consecutively to the prison term or term of imprisonment the offender was serving when the offender committed that offense and to any other prison term previously or subsequently imposed upon the offender.

(3) If a prison term is imposed for a violation of division (B) of section 2911.01 of the Revised Code, a violation of division (A) of section 2913.02 of the Revised Code in which the stolen property is a firearm or dangerous ordnance, or a felony violation of division (B) of section 2921.331 [2921.33.1] of the Revised Code, the offender shall serve that prison term consecutively to any other prison term or mandatory prison term previously or subsequently imposed upon the offender.

(4) If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the

seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any of the following:

(a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to *section 2929.16, 2929.17, or 2929.18 of the Revised Code*, or was under post-release control for a prior offense.

(b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct.

(c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

(5) If a mandatory prison term is imposed upon an offender pursuant to division (D)(5) or (6) of this section, the offender shall serve the mandatory prison term consecutively to and prior to any prison term imposed for the underlying violation of division (A)(1) or (2) of *section 2903.06 of the Revised Code* pursuant to division (A) of this section or *section 2929.142 [2929.14.2] of the Revised Code*. If a mandatory prison term is imposed upon an offender pursuant to division (D)(5) of this section, and if a mandatory prison term also is imposed upon the offender pursuant to division (D)(6) of this section in relation to the same violation, the offender shall serve the mandatory prison term imposed pursuant to division (D)(5) of this section consecutively to and prior to the mandatory prison term imposed pursuant to division (D)(6) of this section and consecutively to and prior to any prison term imposed for the underlying violation of division (A)(1) or (2) of *section 2903.06 of the Revised Code* pursuant to division (A) of this section or *section 2929.142 [2929.14.2] of the Revised Code*.

(6) When consecutive prison terms are imposed pursuant to division (E)(1), (2), (3), (4), or (5) of this section, the term to be served is the aggregate of all of the terms so imposed.

(F) (1) If a court imposes a prison term for a felony of the first degree, for a felony of the second degree, for a felony sex offense, or for a felony of the third degree that is not a felony sex offense and in the commission of which the offender caused or threatened to cause physical harm to a person, it shall include in the sentence a requirement that the offender be subject to a period of post-release control after the offender's release from imprisonment, in accordance with that division. If a court imposes a sentence including a prison term of a type described in this division on or after July 11, 2006, the failure of a court to include a post-release control requirement in the sentence pursuant to this division does not negate, limit, or otherwise affect the mandatory period of post-release control that is required for the offender under division (B) of *section 2967.28 of the Revised Code*. *Section 2929.191 [2929.19.1] of the Revised Code* applies if, prior to July 11, 2006, a court imposed a sentence including a prison term of a type described in this division and failed to include in the sentence pursuant to this division a statement regarding post-release control.

(2) If a court imposes a prison term for a felony of the third, fourth, or fifth degree that is not subject to division (F)(1) of this section, it shall include in the sentence a requirement that the offender be subject to a period of post-release control after the offender's release from imprisonment, in accordance with that division, if the parole board determines that a period of post-release control is necessary. *Section 2929.191 [2929.19.1] of the Revised Code* applies if, prior to July 11, 2006, a court imposed a sentence including a prison term of a type described in this division and failed to include in the sentence pursuant to this division a statement regarding post-release control.

(G) The court shall impose sentence upon the offender in accordance with *section 2971.03 of the Revised Code*, and Chapter 2971. of the Revised Code applies regarding the prison term or term of life imprisonment without parole imposed upon the offender and the service of that term of imprisonment if any of the following apply:

(1) A person is convicted of or pleads guilty to a violent sex offense or a designated homicide, assault, or kidnapping offense, and, in relation to that offense, the offender is adjudicated a sexually violent predator.

(2) A person is convicted of or pleads guilty to a violation of division (A)(1)(b) of *section 2907.02 of the Revised Code* committed on or after January 2, 2007, and either the court does not impose a sentence of life without parole when authorized pursuant to division (B) of *section 2907.02 of the Revised Code*, or division (B) of *section 2907.02 of the Revised Code* provides that the court shall not sentence the offender pursuant to *section 2971.03 of the Revised Code*.

(3) A person is convicted of or pleads guilty to attempted rape committed on or after January 2, 2007, and a specification of the type described in *section 2941.1418 [2941.14.18]*, *2941.1419 [2941.14.19]*, or *2941.1420 [2941.14.20]* of the Revised Code.

(4) A person is convicted of or pleads guilty to a violation of *section 2905.01 of the Revised Code* committed on or after the effective date of this amendment, and that section requires the court to sentence the offender pursuant to *section 2971.03 of the Revised Code*.

(5) A person is convicted of or pleads guilty to aggravated murder committed on or after the effective date of this amendment, and division (A)(2)(b)(ii) of *section 2929.022 [2929.02.2]*, division (A)(1)(e), (C)(1)(a)(v), (C)(2)(a)(ii), (D)(2)(b), (D)(3)(a)(iv), or (E)(1)(d) of *section 2929.03*, or division (A) or (B) of *section 2929.06 of the Revised Code* requires the court to sentence the offender pursuant to division (B)(3) of *section 2971.03 of the Revised Code*.

(6) A person is convicted of or pleads guilty to murder committed on or after the effective date of this amendment, and division (B)(2) of *section 2929.02 of the Revised Code* requires the court to sentence the offender pursuant to *section 2971.03 of the Revised Code*.

(H) If a person who has been convicted of or pleaded guilty to a felony is sentenced to a prison term or term of imprisonment under this section, *sections 2929.02 to 2929.06 of the Revised Code*, *section 2929.142 [2929.14.2]* of the Revised Code, or *section 2971.03 of the Revised Code*, or any other provision of law, *section 5120.163 [5120.16.3]* of the Revised Code applies regarding the person while the person is confined in a state correctional institution.

(I) If an offender who is convicted of or pleads guilty to a felony that is an offense of violence also is convicted of or pleads guilty to a specification of the type described in *section 2941.142 [2941.14.2]* of the Revised Code that charges the offender with having committed the felony while participating in a criminal gang, the court shall impose upon the offender an additional prison term of one, two, or three years.

(J) If an offender who is convicted of or pleads guilty to aggravated murder, murder, or a felony of the first, second, or third degree that is an offense of violence also is convicted of or pleads guilty to a specification of the type described in *section 2941.143 [2941.14.3]* of the Revised Code that charges the offender with having committed the offense in a school safety zone or towards a person in a school safety zone, the court shall impose upon the offender an additional prison term of two years. The offender shall serve the additional two years consecutively to and prior to the prison term imposed for the underlying offense.

(K) At the time of sentencing, the court may recommend the offender for placement in a program of shock incarceration under *section 5120.031 [5120.03.1]* of the Revised Code or for placement in an intensive program prison under *section 5120.032 [5120.03.2]* of the Revised Code, disapprove placement of the offender in a program of shock incarceration or an intensive program prison of that nature, or make no recommendation on placement of the offender. In no case shall the department of rehabilitation and correction place the offender in a program or prison of that nature unless the department determines as specified in *section 5120.031 [5120.03.1]* or *5120.032 [5120.03.2]* of the Revised Code, whichever is applicable, that the offender is eligible for the placement.

If the court disapproves placement of the offender in a program or prison of that nature, the department of rehabilitation and correction shall not place the offender in any program of shock incarceration or intensive program prison.

If the court recommends placement of the offender in a program of shock incarceration or in an intensive program prison, and if the offender is subsequently placed in the recommended program or prison, the department shall notify the court of the placement and shall include with the notice a brief description of the placement.

If the court recommends placement of the offender in a program of shock incarceration or in an intensive program prison and the department does not subsequently place the offender in the recommended program or prison, the department shall send a notice to the court indicating why the offender was not placed in the recommended program or prison.

If the court does not make a recommendation under this division with respect to an offender and if the department determines as specified in *section 5120.031 [5120.03.1]* or *5120.032 [5120.03.2]* of the Revised Code, whichever is applicable, that the offender is eligible for placement in a program or prison of that nature, the department shall screen the offender and determine if there is an available program of shock incarceration or an intensive program prison for which the offender is suited. If there is an available program of shock incarceration or an intensive program prison for which the offender is suited, the department shall notify the court of the proposed placement of the offender as specified

in *section 5120.031 [5120.03.1] or 5120.032 [5120.03.2] of the Revised Code* and shall include with the notice a brief description of the placement. The court shall have ten days from receipt of the notice to disapprove the placement.

(L) If a person is convicted of or pleads guilty to aggravated vehicular homicide in violation of division (A) (1) of *section 2903.06 of the Revised Code* and division (B)(2)(c) of that section applies, the person shall be sentenced pursuant to *section 2929.142 [2929.14.2] of the Revised Code*.

LEXSTAT O.R.C. 2929.18

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*** ANNOTATIONS CURRENT THROUGH SEPTEMBER 1, 2007 ***

*** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH NOVEMBER 4, 2007 ***

TITLE 29. CRIMES -- PROCEDURE
 CHAPTER 2929. PENALTIES AND SENTENCING
 PENALTIES FOR FELONY

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ORC Ann. 2929.18 (2007)

§ 2929.18. Financial sanctions; restitution

(A) Except as otherwise provided in this division and in addition to imposing court costs pursuant to *section 2947.23 of the Revised Code*, the court imposing a sentence upon an offender for a felony may sentence the offender to any financial sanction or combination of financial sanctions authorized under this section or, in the circumstances specified in *section 2929.32 of the Revised Code*, may impose upon the offender a fine in accordance with that section. Financial sanctions that may be imposed pursuant to this section include, but are not limited to, the following:

(1) Restitution by the offender to the victim of the offender's crime or any survivor of the victim, in an amount based on the victim's economic loss. If the court imposes restitution, the court shall order that the restitution be made to the victim in open court, to the adult probation department that serves the county on behalf of the victim, to the clerk of courts, or to another agency designated by the court. If the court imposes restitution, at sentencing, the court shall determine the amount of restitution to be made by the offender. If the court imposes restitution, the court may base the amount of restitution it orders on an amount recommended by the victim, the offender, a presentence investigation report, estimates or receipts indicating the cost of repairing or replacing property, and other information, provided that the amount the court orders as restitution shall not exceed the amount of the economic loss suffered by the victim as a direct and proximate result of the commission of the offense. If the court decides to impose restitution, the court shall hold a hearing on restitution if the offender, victim, or survivor disputes the amount. All restitution payments shall be credited against any recovery of economic loss in a civil action brought by the victim or any survivor of the victim against the offender.

If the court imposes restitution, the court may order that the offender pay a surcharge of not more than five per cent of the amount of the restitution otherwise ordered to the entity responsible for collecting and processing restitution payments.

The victim or survivor may request that the prosecutor in the case file a motion, or the offender may file a motion, for modification of the payment terms of any restitution ordered. If the court grants the motion, it may modify the payment terms as it determines appropriate.

(2) Except as provided in division (B)(1), (3), or (4) of this section, a fine payable by the offender to the state, to a political subdivision, or as described in division (B)(2) of this section to one or more law enforcement agencies, with the amount of the fine based on a standard percentage of the offender's daily income over a period of time determined by the court and based upon the seriousness of the offense. A fine ordered under this division shall not exceed the maximum conventional fine amount authorized for the level of the offense under division (A)(3) of this section.

(3) Except as provided in division (B)(1), (3), or (4) of this section, a fine payable by the offender to the state, to a political subdivision when appropriate for a felony, or as described in division (B)(2) of this section to one or more law enforcement agencies, in the following amount:

- (a) For a felony of the first degree, not more than twenty thousand dollars;
- (b) For a felony of the second degree, not more than fifteen thousand dollars;
- (c) For a felony of the third degree, not more than ten thousand dollars;
- (d) For a felony of the fourth degree, not more than five thousand dollars;
- (e) For a felony of the fifth degree, not more than two thousand five hundred dollars.

(4) A state fine or costs as defined in *section 2949.111 of the Revised Code*.

(5) (a) Reimbursement by the offender of any or all of the costs of sanctions incurred by the government, including the following:

(i) All or part of the costs of implementing any community control sanction, including a supervision fee under *section 2951.021 of the Revised Code*;

(ii) All or part of the costs of confinement under a sanction imposed pursuant to *section 2929.14, 2929.142 [2929.14.2], or 2929.16 of the Revised Code*, provided that the amount of reimbursement ordered under this division shall not exceed the total amount of reimbursement the offender is able to pay as determined at a hearing and shall not exceed the actual cost of the confinement.

(b) If the offender is sentenced to a sanction of confinement pursuant to *section 2929.14 or 2929.16 of the Revised Code* that is to be served in a facility operated by a board of county commissioners, a legislative authority of a municipal corporation, or another local governmental entity, if, pursuant to *section 307.93, 341.14, 341.19, 341.23, 753.02, 753.04, 753.16, 2301.56, or 2947.19 of the Revised Code* and *section 2929.37 of the Revised Code*, the board, legislative authority, or other local governmental entity requires prisoners to reimburse the county, municipal corporation, or other entity for its expenses incurred by reason of the prisoner's confinement, and if the court does not impose a financial sanction under division (A)(5)(a)(ii) of this section, confinement costs may be assessed pursuant to *section 2929.37 of the Revised Code*. In addition, the offender may be required to pay the fees specified in *section 2929.38 of the Revised Code* in accordance with that section.

(c) Reimbursement by the offender for costs pursuant to *section 2929.71 of the Revised Code*.

(B) (1) For a first, second, or third degree felony violation of any provision of Chapter 2925., 3719., or 4729. of the Revised Code, the sentencing court shall impose upon the offender a mandatory fine of at least one-half of, but not more than, the maximum statutory fine amount authorized for the level of the offense pursuant to division (A)(3) of this section. If an offender alleges in an affidavit filed with the court prior to sentencing that the offender is indigent and unable to pay the mandatory fine and if the court determines the offender is an indigent person and is unable to pay the mandatory fine described in this division, the court shall not impose the mandatory fine upon the offender.

(2) Any mandatory fine imposed upon an offender under division (B)(1) of this section and any fine imposed upon an offender under division (A)(2) or (3) of this section for any fourth or fifth degree felony violation of any provision of Chapter 2925., 3719., or 4729. of the Revised Code shall be paid to law enforcement agencies pursuant to division (F) of *section 2925.03 of the Revised Code*.

(3) For a fourth degree felony OVI offense and for a third degree felony OVI offense, the sentencing court shall impose upon the offender a mandatory fine in the amount specified in division (G)(1)(d) or (e) of *section 4511.19 of the Revised Code*, whichever is applicable. The mandatory fine so imposed shall be disbursed as provided in the division pursuant to which it is imposed.

(4) Notwithstanding any fine otherwise authorized or required to be imposed under division (A)(2) or (3) or (B)(1) of this section or *section 2929.31 of the Revised Code* for a violation of *section 2925.03 of the Revised Code*, in addition to any penalty or sanction imposed for that offense under *section 2925.03* or *sections 2929.11 to 2929.18 of the Revised Code* and in addition to the forfeiture of property in connection with the offense as prescribed in Chapter 2981. of the Revised Code, the court that sentences an offender for a violation of *section 2925.03 of the Revised Code* may impose upon the offender a fine in addition to any fine imposed under division (A)(2) or (3) of this section and in addi-

tion to any mandatory fine imposed under division (B)(1) of this section. The fine imposed under division (B)(4) of this section shall be used as provided in division (H) of *section 2925.03 of the Revised Code*. A fine imposed under division (B)(4) of this section shall not exceed whichever of the following is applicable:

(a) The total value of any personal or real property in which the offender has an interest and that was used in the course of, intended for use in the course of, derived from, or realized through conduct in violation of *section 2925.03 of the Revised Code*, including any property that constitutes proceeds derived from that offense;

(b) If the offender has no interest in any property of the type described in division (B)(4)(a) of this section or if it is not possible to ascertain whether the offender has an interest in any property of that type in which the offender may have an interest, the amount of the mandatory fine for the offense imposed under division (B)(1) of this section or, if no mandatory fine is imposed under division (B)(1) of this section, the amount of the fine authorized for the level of the offense imposed under division (A)(3) of this section.

(5) Prior to imposing a fine under division (B)(4) of this section, the court shall determine whether the offender has an interest in any property of the type described in division (B)(4)(a) of this section. Except as provided in division (B)(6) or (7) of this section, a fine that is authorized and imposed under division (B)(4) of this section does not limit or affect the imposition of the penalties and sanctions for a violation of *section 2925.03 of the Revised Code* prescribed under those sections or *sections 2929.11 to 2929.18 of the Revised Code* and does not limit or affect a forfeiture of property in connection with the offense as prescribed in Chapter 2981. of the Revised Code.

(6) If the sum total of a mandatory fine amount imposed for a first, second, or third degree felony violation of *section 2925.03 of the Revised Code* under division (B)(1) of this section plus the amount of any fine imposed under division (B)(4) of this section does not exceed the maximum statutory fine amount authorized for the level of the offense under division (A)(3) of this section or *section 2929.31 of the Revised Code*, the court may impose a fine for the offense in addition to the mandatory fine and the fine imposed under division (B)(4) of this section. The sum total of the amounts of the mandatory fine, the fine imposed under division (B)(4) of this section, and the additional fine imposed under division (B)(6) of this section shall not exceed the maximum statutory fine amount authorized for the level of the offense under division (A)(3) of this section or *section 2929.31 of the Revised Code*. The clerk of the court shall pay any fine that is imposed under division (B)(6) of this section to the county, township, municipal corporation, park district as created pursuant to *section 511.18 or 1545.04 of the Revised Code*, or state law enforcement agencies in this state that primarily were responsible for or involved in making the arrest of, and in prosecuting, the offender pursuant to division (F) of *section 2925.03 of the Revised Code*.

(7) If the sum total of the amount of a mandatory fine imposed for a first, second, or third degree felony violation of *section 2925.03 of the Revised Code* plus the amount of any fine imposed under division (B)(4) of this section exceeds the maximum statutory fine amount authorized for the level of the offense under division (A)(3) of this section or *section 2929.31 of the Revised Code*, the court shall not impose a fine under division (B)(6) of this section.

(C) (1) The offender shall pay reimbursements imposed upon the offender pursuant to division (A)(5)(a) of this section to pay the costs incurred by the department of rehabilitation and correction in operating a prison or other facility used to confine offenders pursuant to sanctions imposed under *section 2929.14, 2929.142 [2929.14.2], or 2929.16 of the Revised Code* to the treasurer of state. The treasurer of state shall deposit the reimbursements in the confinement cost reimbursement fund that is hereby created in the state treasury. The department of rehabilitation and correction shall use the amounts deposited in the fund to fund the operation of facilities used to confine offenders pursuant to *sections 2929.14, 2929.142 [2929.14.2], and 2929.16 of the Revised Code*.

(2) Except as provided in *section 2951.021 [2951.02.1] of the Revised Code*, the offender shall pay reimbursements imposed upon the offender pursuant to division (A)(5)(a) of this section to pay the costs incurred by a county pursuant to any sanction imposed under this section or *section 2929.16 or 2929.17 of the Revised Code* or in operating a facility used to confine offenders pursuant to a sanction imposed under *section 2929.16 of the Revised Code* to the county treasurer. The county treasurer shall deposit the reimbursements in the sanction cost reimbursement fund that each board of county commissioners shall create in its county treasury. The county shall use the amounts deposited in the fund to pay the costs incurred by the county pursuant to any sanction imposed under this section or *section 2929.16 or 2929.17 of the Revised Code* or in operating a facility used to confine offenders pursuant to a sanction imposed under *section 2929.16 of the Revised Code*.

(3) Except as provided in *section 2951.021 [2951.02.1] of the Revised Code*, the offender shall pay reimbursements imposed upon the offender pursuant to division (A)(5)(a) of this section to pay the costs incurred by a municipal

corporation pursuant to any sanction imposed under this section or *section 2929.16* or *2929.17 of the Revised Code* or in operating a facility used to confine offenders pursuant to a sanction imposed under *section 2929.16 of the Revised Code* to the treasurer of the municipal corporation. The treasurer shall deposit the reimbursements in a special fund that shall be established in the treasury of each municipal corporation. The municipal corporation shall use the amounts deposited in the fund to pay the costs incurred by the municipal corporation pursuant to any sanction imposed under this section or *section 2929.16* or *2929.17 of the Revised Code* or in operating a facility used to confine offenders pursuant to a sanction imposed under *section 2929.16 of the Revised Code*.

(4) Except as provided in *section 2951.021 [2951.02.1] of the Revised Code*, the offender shall pay reimbursements imposed pursuant to division (A)(5)(a) of this section for the costs incurred by a private provider pursuant to a sanction imposed under this section or *section 2929.16* or *2929.17 of the Revised Code* to the provider.

(D) Except as otherwise provided in this division, a financial sanction imposed pursuant to division (A) or (B) of this section is a judgment in favor of the state or a political subdivision in which the court that imposed the financial sanction is located, and the offender subject to the financial sanction is the judgment debtor. A financial sanction of reimbursement imposed pursuant to division (A)(5)(a)(ii) of this section upon an offender who is incarcerated in a state facility or a municipal jail is a judgment in favor of the state or the municipal corporation, and the offender subject to the financial sanction is the judgment debtor. A financial sanction of reimbursement imposed upon an offender pursuant to this section for costs incurred by a private provider of sanctions is a judgment in favor of the private provider, and the offender subject to the financial sanction is the judgment debtor. A financial sanction of restitution imposed pursuant to this section is an order in favor of the victim of the offender's criminal act that can be collected through execution as described in division (D)(1) of this section or through an order as described in division (D)(2) of this section, and the offender shall be considered for purposes of the collection as the judgment debtor. Imposition of a financial sanction and execution on the judgment does not preclude any other power of the court to impose or enforce sanctions on the offender. Once the financial sanction is imposed as a judgment or order under this division, the victim, private provider, state, or political subdivision may bring an action to do any of the following:

(1) Obtain execution of the judgment or order through any available procedure, including:

- (a) An execution against the property of the judgment debtor under Chapter 2329. of the Revised Code;
- (b) An execution against the person of the judgment debtor under Chapter 2331. of the Revised Code;
- (c) A proceeding in aid of execution under Chapter 2333. of the Revised Code, including:

(i) A proceeding for the examination of the judgment debtor under *sections 2333.09 to 2333.12 and sections 2333.15 to 2333.27 of the Revised Code*;

(ii) A proceeding for attachment of the person of the judgment debtor under *section 2333.28 of the Revised Code*;

(iii) A creditor's suit under *section 2333.01 of the Revised Code*.

(d) The attachment of the property of the judgment debtor under Chapter 2715. of the Revised Code;

(e) The garnishment of the property of the judgment debtor under Chapter 2716. of the Revised Code.

(2) Obtain an order for the assignment of wages of the judgment debtor under *section 1321.33 of the Revised Code*.

(E) A court that imposes a financial sanction upon an offender may hold a hearing if necessary to determine whether the offender is able to pay the sanction or is likely in the future to be able to pay it.

(F) Each court imposing a financial sanction upon an offender under this section or under *section 2929.32 of the Revised Code* may designate the clerk of the court or another person to collect the financial sanction. The clerk or other person authorized by law or the court to collect the financial sanction may enter into contracts with one or more public agencies or private vendors for the collection of, amounts due under the financial sanction imposed pursuant to this section or *section 2929.32 of the Revised Code*. Before entering into a contract for the collection of amounts due from an offender pursuant to any financial sanction imposed pursuant to this section or *section 2929.32 of the Revised Code*, a court shall comply with *sections 307.86 to 307.92 of the Revised Code*.

(G) If a court that imposes a financial sanction under division (A) or (B) of this section finds that an offender satisfactorily has completed all other sanctions imposed upon the offender and that all restitution that has been ordered has been paid as ordered, the court may suspend any financial sanctions imposed pursuant to this section or *section 2929.32 of the Revised Code* that have not been paid.

(H) No financial sanction imposed under this section or *section 2929.32 of the Revised Code* shall preclude a victim from bringing a civil action against the offender.

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*** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH NOVEMBER 4, 2007 ***

TITLE 29. CRIMES -- PROCEDURE
 CHAPTER 2967. PARDON; PAROLE; PROBATION

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ORC Ann. 2967.01 (2007)

§ 2967.01. Definitions

As used in this chapter:

(A) "State correctional institution" includes any institution or facility that is operated by the department of rehabilitation and correction and that is used for the custody, care, or treatment of criminal, delinquent, or psychologically or psychiatrically disturbed offenders.

(B) "Pardon" means the remission of penalty by the governor in accordance with the power vested in the governor by the constitution.

(C) "Commutation" or "commutation of sentence" means the substitution by the governor of a lesser for a greater punishment. A stated prison term may be commuted without the consent of the convict, except when granted upon the acceptance and performance by the convict of conditions precedent. After commutation, the commuted prison term shall be the only one in existence. The commutation may be stated in terms of commuting from a named offense to a lesser included offense with a shorter prison term, in terms of commuting from a stated prison term in months and years to a shorter prison term in months and years, or in terms of commuting from any other stated prison term to a shorter prison term.

(D) "Reprieve" means the temporary suspension by the governor of the execution of a sentence or prison term. The governor may grant a reprieve without the consent of and against the will of the convict.

(E) "Parole" means, regarding a prisoner who is serving a prison term for aggravated murder or murder, who is serving a prison term of life imprisonment for rape or for felonious sexual penetration as it existed under *section 2907.12 of the Revised Code* prior to September 3, 1996, or who was sentenced prior to July 1, 1996, a release of the prisoner from confinement in any state correctional institution by the adult parole authority that is subject to the eligibility criteria specified in this chapter and that is under the terms and conditions, and for the period of time, prescribed by the authority in its published rules and official minutes or required by division (A) of *section 2967.131 [2967.13.1] of the Revised Code* or another provision of this chapter.

(F) "Head of a state correctional institution" or "head of the institution" means the resident head of the institution and the person immediately in charge of the institution, whether designated warden, superintendent, or any other name by which the head is known.

(G) "Convict" means a person who has been convicted of a felony under the laws of this state, whether or not actually confined in a state correctional institution, unless the person has been pardoned or has served the person's sentence or prison term.

(H) "Prisoner" means a person who is in actual confinement in a state correctional institution.

(I) "Parolee" means any inmate who has been released from confinement on parole by order of the adult parole authority or conditionally pardoned, who is under supervision of the adult parole authority and has not been granted a final release, and who has not been declared in violation of the inmate's parole by the authority or is performing the prescribed conditions of a conditional pardon.

(J) "Releasee" means an inmate who has been released from confinement pursuant to *section 2967.28 of the Revised Code* under a period of post-release control that includes one or more post-release control sanctions.

(K) "Final release" means a remission by the adult parole authority of the balance of the sentence or prison term of a parolee or prisoner or the termination by the authority of a term of post-release control of a releasee.

(L) "Parole violator" or "release violator" means any parolee or releasee who has been declared to be in violation of the condition of parole or post-release control specified in division (A) or (B) of *section 2967.131 [2967.13.1] of the Revised Code* or in violation of any other term, condition, or rule of the parolee's or releasee's parole or of the parolee's or releasee's post-release control sanctions, the determination of which has been made by the adult parole authority and recorded in its official minutes.

(M) "Administrative release" means a termination of jurisdiction over a particular sentence or prison term by the adult parole authority for administrative convenience.

(N) "Post-release control" means a period of supervision by the adult parole authority after a prisoner's release from imprisonment that includes one or more post-release control sanctions imposed under *section 2967.28 of the Revised Code*.

(O) "Post-release control sanction" means a sanction that is authorized under *sections 2929.16 to 2929.18 of the Revised Code* and that is imposed upon a prisoner upon the prisoner's release from a prison term.

(P) "Community control sanction," "prison term," "mandatory prison term," and "stated prison term" have the same meanings as in *section 2929.01 of the Revised Code*.

(Q) "Transitional control" means control of a prisoner under the transitional control program established by the department of rehabilitation and correction under *section 2967.26 of the Revised Code*, if the department establishes a program of that nature under that section.

(R) "Random drug testing" has the same meaning as in *section 5120.63 of the Revised Code*.

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TITLE 29: CRIMES -- PROCEDURE
CHAPTER 2967. PARDON; PAROLE; PROBATION

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ORC Ann. 2967.13 (2007)

§ 2967.13. Parole eligibility

(A) Except as provided in division (G) of this section, a prisoner serving a sentence of imprisonment for life for an offense committed on or after July 1, 1996, is not entitled to any earned credit under *section 2967.193 [2967.19.3] of the Revised Code* and becomes eligible for parole as follows:

(1) If a sentence of imprisonment for life was imposed for the offense of murder, at the expiration of the prisoner's minimum term;

(2) If a sentence of imprisonment for life with parole eligibility after serving twenty years of imprisonment was imposed pursuant to *section 2929.022 [2929.02.2]* or *2929.03 of the Revised Code*, after serving a term of twenty years;

(3) If a sentence of imprisonment for life with parole eligibility after serving twenty-five full years of imprisonment was imposed pursuant to *section 2929.022 [2929.02.2]* or *2929.03 of the Revised Code*, after serving a term of twenty-five full years;

(4) If a sentence of imprisonment for life with parole eligibility after serving thirty full years of imprisonment was imposed pursuant to *section 2929.022 [2929.02.2]* or *2929.03 of the Revised Code*, after serving a term of thirty full years;

(5) If a sentence of imprisonment for life was imposed for rape, after serving a term of ten full years' imprisonment;

(6) If a sentence of imprisonment for life with parole eligibility after serving fifteen years of imprisonment was imposed for a violation of *section 2927.24 of the Revised Code*, after serving a term of fifteen years.

(B) Except as provided in division (G) of this section, a prisoner serving a sentence of imprisonment for life with parole eligibility after serving twenty years of imprisonment or a sentence of imprisonment for life with parole eligibility after serving twenty-five full years or thirty full years of imprisonment imposed pursuant to *section 2929.022 [2929.02.2]* or *2929.03 of the Revised Code* for an offense committed on or after July 1, 1996, consecutively to any other term of imprisonment, becomes eligible for parole after serving twenty years, twenty full years, or thirty full years, as applicable, as to each such sentence of life imprisonment, which shall not be reduced for earned credits under *section 2967.193 [2967.19.3] of the Revised Code*, plus the term or terms of the other sentences consecutively imposed or, if one of the other sentences is another type of life sentence with parole eligibility, the number of years before parole eligibility for that sentence.

(C) Except as provided in division (G) of this section, a prisoner serving consecutively two or more sentences in which an indefinite term of imprisonment is imposed becomes eligible for parole upon the expiration of the aggregate of the minimum terms of the sentences.

(D) Except as provided in division (G) of this section, a prisoner serving a term of imprisonment who is described in division (A) of *section 2967.021 [2967.02.1] of the Revised Code* becomes eligible for parole as described in that division or, if the prisoner is serving a definite term of imprisonment, shall be released as described in that division.

(E) A prisoner serving a sentence of life imprisonment without parole imposed pursuant to *section 2907.02* or *section 2929.03* or *2929.06 of the Revised Code* is not eligible for parole and shall be imprisoned until death.

(F) A prisoner serving a stated prison term shall be released in accordance with *section 2967.28 of the Revised Code*.

(G) A prisoner serving a prison term or term of life imprisonment without parole imposed pursuant to *section 2971.03 of the Revised Code* never becomes eligible for parole during that term of imprisonment.

LEXSTAT O.R.C. 2967.15

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*** CURRENT THROUGH LEGISLATION PASSED BY THE 127TH OHIO GENERAL ASSEMBLY AND FILED
WITH THE SECRETARY OF STATE THROUGH NOVEMBER 8, 2007 ***

*** ANNOTATIONS CURRENT THROUGH SEPTEMBER 1, 2007 ***

*** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH NOVEMBER 4, 2007 ***

TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2967. PARDON; PAROLE; PROBATION

Go to the Ohio Code Archive Directory

ORC Ann. 2967.15 (2007)

§ 2967.15. Arrest of parolee or other releasee for violation; hearing; disposition

(A) If an adult parole authority field officer has reasonable cause to believe that a person who is a parolee or releasee, who is under transitional control, or who is under another form of authorized release and who is under the supervision of the adult parole authority has violated or is violating the condition of a conditional pardon, parole, other form of authorized release, transitional control, or post-release control specified in division (A) of *section 2967.131 [2967.13.1] of the Revised Code* or any other term or condition of the person's conditional pardon, parole, other form of authorized release, transitional control, or post-release control, the field officer may arrest the person without a warrant or order a peace officer to arrest the person without a warrant. A person so arrested shall be confined in the jail of the county in which the person is arrested or in another facility designated by the chief of the adult parole authority until a determination is made regarding the person's release status. Upon making an arrest under this section, the arresting or supervising adult parole authority field officer promptly shall notify the superintendent of parole supervision or the superintendent's designee, in writing, that the person has been arrested and is in custody and submit an appropriate report of the reason for the arrest.

(B) Except as otherwise provided in this division, prior to the revocation by the adult parole authority of a person's pardon, parole, transitional control, or other release and prior to the imposition by the parole board or adult parole authority of a new prison term as a post-release control sanction for a person, the adult parole authority shall grant the person a hearing in accordance with rules adopted by the department of rehabilitation and correction under Chapter 119. of the Revised Code. The adult parole authority is not required to grant the person a hearing if the person is convicted of or pleads guilty to an offense that the person committed while released on a pardon, on parole, transitional control, or another form of release, or on post-release control and upon which the revocation of the person's pardon, parole, transitional control, other release, or post-release control is based.

If a person who has been pardoned is found to be a violator of the conditions of the parolee's conditional pardon or commutation of sentence, the authority forthwith shall transmit to the governor its recommendation concerning that violation, and the violator shall be retained in custody until the governor issues an order concerning that violation.

If the authority fails to make a determination of the case of a parolee or releasee alleged to be a violator of the terms and conditions of the parolee's or releasee's conditional pardon, parole, other release, or post-release control sanctions within a reasonable time, the parolee or releasee shall be released from custody under the same terms and conditions of the parolee's or releasee's original conditional pardon, parole, other release, or post-release control sanctions.

(C) (1) If a person who is a parolee or releasee, who is under transitional control, or who is under another form of authorized release under the supervision of the adult parole authority absconds from supervision, the supervising adult

parole authority field officer shall report that fact to the superintendent of parole supervision, in writing, and the authority shall declare that person to be a violator at large. Upon being advised of the apprehension and availability for return of a violator at large, the superintendent of parole supervision shall determine whether the violator at large should be restored to parole, transitional control, another form of authorized release, or post-release control.

The time between the date on which a person who is a parolee or other releasee is declared to be a violator or violator at large and the date on which that person is returned to custody in this state under the immediate control of the adult parole authority shall not be counted as time served under the sentence imposed on that person or as a part of the term of post-release control.

(2) A person who is under transitional control or who is under any form of authorized release under the supervision of the adult parole authority is considered to be in custody while under the transitional control or on release, and, if the person absconds from supervision, the person may be prosecuted for the offense of escape.

(D) A person who is a parolee or releasee, who is under transitional control, or who is under another form of authorized release under the supervision of the adult parole authority and who has violated a term or condition of the person's conditional pardon, parole, transitional control, other form of authorized release, or post-release control shall be declared to be a violator if the person is committed to a correctional institution outside the state to serve a sentence imposed upon the person by a federal court or a court of another state or if the person otherwise leaves the state.

(E) As used in this section, "peace officer" has the same meaning as in *section 2935.01 of the Revised Code*.

LEXSTAT O.R.C. 2967.28

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TITLE 29. CRIMES -- PROCEDURE
 CHAPTER 2967. PARDON; PAROLE; PROBATION

Go to the Ohio Code Archive Directory

ORC Ann. 2967.28 (2007)

§ 2967.28. Period of post-release control for certain offenders; sanctions; proceedings upon violation

(A) As used in this section:

- (1) "Monitored time" means the monitored time sanction specified in *section 2929.17 of the Revised Code*.
- (2) "Deadly weapon" and "dangerous ordnance" have the same meanings as in *section 2923.11 of the Revised Code*.
- (3) "Felony sex offense" means a violation of a section contained in Chapter 2907. of the Revised Code that is a felony.

(B) Each sentence to a prison term for a felony of the first degree, for a felony of the second degree, for a felony sex offense, or for a felony of the third degree that is not a felony sex offense and in the commission of which the offender caused or threatened to cause physical harm to a person shall include a requirement that the offender be subject to a period of post-release control imposed by the parole board after the offender's release from imprisonment. If a court imposes a sentence including a prison term of a type described in this division on or after the effective date of this amendment, the failure of a sentencing court to notify the offender pursuant to division (B)(3)(c) of *section 2929.19 of the Revised Code* of this requirement or to include in the judgment of conviction entered on the journal a statement that the offender's sentence includes this requirement does not negate, limit, or otherwise affect the mandatory period of supervision that is required for the offender under this division. *Section 2929.191 [2929.19.1] of the Revised Code* applies if, prior to the effective date of this amendment, a court imposed a sentence including a prison term of a type described in this division and failed to notify the offender pursuant to division (B)(3)(c) of *section 2929.19 of the Revised Code* regarding post-release control or to include in the judgment of conviction entered on the journal or in the sentence pursuant to division (F)(1) of *section 2929.14 of the Revised Code* a statement regarding post-release control. Unless reduced by the parole board pursuant to division (D) of this section when authorized under that division, a period of post-release control required by this division for an offender shall be of one of the following periods:

- (1) For a felony of the first degree or for a felony sex offense, five years;
- (2) For a felony of the second degree that is not a felony sex offense, three years;
- (3) For a felony of the third degree that is not a felony sex offense and in the commission of which the offender caused or threatened physical harm to a person, three years.

(C) Any sentence to a prison term for a felony of the third, fourth, or fifth degree that is not subject to division (B)(1) or (3) of this section shall include a requirement that the offender be subject to a period of post-release control of

up to three years after the offender's release from imprisonment, if the parole board, in accordance with division (D) of this section, determines that a period of post-release control is necessary for that offender. *Section 2929.191 [2929.19.1] of the Revised Code* applies if, prior to the effective date of this amendment, a court imposed a sentence including a prison term of a type described in this division and failed to notify the offender pursuant to division (B)(3)(d) of *section 2929.19 of the Revised Code* regarding post-release control or to include in the judgment of conviction entered on the journal or in the sentence pursuant to division (F)(2) of *section 2929.14 of the Revised Code* a statement regarding post-release control.

(D) (1) Before the prisoner is released from imprisonment, the parole board shall impose upon a prisoner described in division (B) of this section, may impose upon a prisoner described in division (C) of this section, and shall impose upon a prisoner described in division (B)(2)(b) of section 5120.031 [5120.03.1] or in division (B)(1) of *section 5120.032 [5120.03.2] of the Revised Code*, one or more post-release control sanctions to apply during the prisoner's period of post-release control. Whenever the board imposes one or more post-release control sanctions upon a prisoner, the board, in addition to imposing the sanctions, also shall include as a condition of the post-release control that the individual or felon not leave the state without permission of the court or the individual's or felon's parole or probation officer and that the individual or felon abide by the law. The board may impose any other conditions of release under a post-release control sanction that the board considers appropriate, and the conditions of release may include any community residential sanction, community nonresidential sanction, or financial sanction that the sentencing court was authorized to impose pursuant to *sections 2929.16, 2929.17, and 2929.18 of the Revised Code*. Prior to the release of a prisoner for whom it will impose one or more post-release control sanctions under this division, the parole board shall review the prisoner's criminal history, all juvenile court adjudications finding the prisoner, while a juvenile, to be a delinquent child, and the record of the prisoner's conduct while imprisoned. The parole board shall consider any recommendation regarding post-release control sanctions for the prisoner made by the office of victims' services. After considering those materials, the board shall determine, for a prisoner described in division (B) of this section, division (B)(2)(b) of section 5120.031 [5120.03.1], or division (B)(1) of *section 5120.032 [5120.03.2] of the Revised Code*, which post-release control sanction or combination of post-release control sanctions is reasonable under the circumstances or, for a prisoner described in division (C) of this section, whether a post-release control sanction is necessary and, if so, which post-release control sanction or combination of post-release control sanctions is reasonable under the circumstances. In the case of a prisoner convicted of a felony of the fourth or fifth degree other than a felony sex offense, the board shall presume that monitored time is the appropriate post-release control sanction unless the board determines that a more restrictive sanction is warranted. A post-release control sanction imposed under this division takes effect upon the prisoner's release from imprisonment.

Regardless of whether the prisoner was sentenced to the prison term prior to, on, or after the effective date of this amendment, prior to the release of a prisoner for whom it will impose one or more post-release control sanctions under this division, the parole board shall notify the prisoner that, if the prisoner violates any sanction so imposed or any condition of post-release control described in division (B) of *section 2967.131 [2967.13.1] of the Revised Code* that is imposed on the prisoner, the parole board may impose a prison term of up to one-half of the stated prison term originally imposed upon the prisoner.

(2) At any time after a prisoner is released from imprisonment and during the period of post-release control applicable to the releasee, the adult parole authority may review the releasee's behavior under the post-release control sanctions imposed upon the releasee under this section. The authority may determine, based upon the review and in accordance with the standards established under division (E) of this section, that a more restrictive or a less restrictive sanction is appropriate and may impose a different sanction. Unless the period of post-release control was imposed for an offense described in division (B)(1) of this section, the authority also may recommend that the parole board reduce the duration of the period of post-release control imposed by the court. If the authority recommends that the board reduce the duration of control for an offense described in division (B)(2), (B)(3), or (C) of this section, the board shall review the releasee's behavior and may reduce the duration of the period of control imposed by the court. In no case shall the board reduce the duration of the period of control imposed by the court for an offense described in division (B)(1) of this section, and in no case shall the board permit the releasee to leave the state without permission of the court or the releasee's parole or probation officer.

(E) The department of rehabilitation and correction, in accordance with Chapter 119. of the Revised Code, shall adopt rules that do all of the following:

(1) Establish standards for the imposition by the parole board of post-release control sanctions under this section that are consistent with the overriding purposes and sentencing principles set forth in *section 2929.11 of the Revised Code* and that are appropriate to the needs of releasees;

(2) Establish standards by which the parole board can determine which prisoners described in division (C) of this section should be placed under a period of post-release control;

(3) Establish standards to be used by the parole board in reducing the duration of the period of post-release control imposed by the court when authorized under division (D) of this section, in imposing a more restrictive post-release control sanction than monitored time upon a prisoner convicted of a felony of the fourth or fifth degree other than a felony sex offense, or in imposing a less restrictive control sanction upon a releasee based on the releasee's activities including, but not limited to, remaining free from criminal activity and from the abuse of alcohol or other drugs, successfully participating in approved rehabilitation programs, maintaining employment, and paying restitution to the victim or meeting the terms of other financial sanctions;

(4) Establish standards to be used by the adult parole authority in modifying a releasee's post-release control sanctions pursuant to division (D)(2) of this section;

(5) Establish standards to be used by the adult parole authority or parole board in imposing further sanctions under division (F) of this section on releasees who violate post-release control sanctions, including standards that do the following:

- (a) Classify violations according to the degree of seriousness;
- (b) Define the circumstances under which formal action by the parole board is warranted;
- (c) Govern the use of evidence at violation hearings;
- (d) Ensure procedural due process to an alleged violator;
- (e) Prescribe nonresidential community control sanctions for most misdemeanor and technical violations;
- (f) Provide procedures for the return of a releasee to imprisonment for violations of post-release control.

(F) (1) Whenever the parole board imposes one or more post-release control sanctions upon an offender under this section, the offender upon release from imprisonment shall be under the general jurisdiction of the adult parole authority and generally shall be supervised by the field services section through its staff of parole and field officers as described in *section 5149.04 of the Revised Code*, as if the offender had been placed on parole. If the offender upon release from imprisonment violates the post-release control sanction or any conditions described in division (A) of *section 2967.131 [2967.13.1] of the Revised Code* that are imposed on the offender, the public or private person or entity that operates or administers the sanction or the program or activity that comprises the sanction shall report the violation directly to the adult parole authority or to the officer of the authority who supervises the offender. The authority's officers may treat the offender as if the offender were on parole and in violation of the parole, and otherwise shall comply with this section.

(2) If the adult parole authority determines that a releasee has violated a post-release control sanction or any conditions described in division (A) of *section 2967.131 [2967.13.1] of the Revised Code* imposed upon the releasee and that a more restrictive sanction is appropriate, the authority may impose a more restrictive sanction upon the releasee, in accordance with the standards established under division (E) of this section, or may report the violation to the parole board for a hearing pursuant to division (F)(3) of this section. The authority may not, pursuant to this division, increase the duration of the releasee's post-release control or impose as a post-release control sanction a residential sanction that includes a prison term, but the authority may impose on the releasee any other residential sanction, nonresidential sanction, or financial sanction that the sentencing court was authorized to impose pursuant to *sections 2929.16, 2929.17, and 2929.18 of the Revised Code*.

(3) The parole board may hold a hearing on any alleged violation by a releasee of a post-release control sanction or any conditions described in division (A) of *section 2967.131 [2967.13.1] of the Revised Code* that are imposed upon the releasee. If after the hearing the board finds that the releasee violated the sanction or condition, the board may increase the duration of the releasee's post-release control up to the maximum duration authorized by division (B) or (C) of this section or impose a more restrictive post-release control sanction. When appropriate, the board may impose as a post-release control sanction a residential sanction that includes a prison term. The board shall consider a prison term as

a post-release control sanction imposed for a violation of post-release control when the violation involves a deadly weapon or dangerous ordnance, physical harm or attempted serious physical harm to a person, or sexual misconduct, or when the releasee committed repeated violations of post-release control sanctions. The period of a prison term that is imposed as a post-release control sanction under this division shall not exceed nine months, and the maximum cumulative prison term for all violations under this division shall not exceed one-half of the stated prison term originally imposed upon the offender as part of this sentence. The period of a prison term that is imposed as a post-release control sanction under this division shall not count as, or be credited toward, the remaining period of post-release control.

If an offender is imprisoned for a felony committed while under post-release control supervision and is again released on post-release control for a period of time determined by division (F)(4)(d) of this section, the maximum cumulative prison term for all violations under this division shall not exceed one-half of the total stated prison terms of the earlier felony, reduced by any prison term administratively imposed by the parole board, plus one-half of the total stated prison term of the new felony.

(4) Any period of post-release control shall commence upon an offender's actual release from prison. If an offender is serving an indefinite prison term or a life sentence in addition to a stated prison term, the offender shall serve the period of post-release control in the following manner:

(a) If a period of post-release control is imposed upon the offender and if the offender also is subject to a period of parole under a life sentence or an indefinite sentence, and if the period of post-release control ends prior to the period of parole, the offender shall be supervised on parole. The offender shall receive credit for post-release control supervision during the period of parole. The offender is not eligible for final release under *section 2967.16 of the Revised Code* until the post-release control period otherwise would have ended.

(b) If a period of post-release control is imposed upon the offender and if the offender also is subject to a period of parole under an indefinite sentence, and if the period of parole ends prior to the period of post-release control, the offender shall be supervised on post-release control. The requirements of parole supervision shall be satisfied during the post-release control period.

(c) If an offender is subject to more than one period of post-release control, the period of post-release control for all of the sentences shall be the period of post-release control that expires last, as determined by the parole board. Periods of post-release control shall be served concurrently and shall not be imposed consecutively to each other.

(d) The period of post-release control for a releasee who commits a felony while under post-release control for an earlier felony shall be the longer of the period of post-release control specified for the new felony under division (B) or (C) of this section or the time remaining under the period of post-release control imposed for the earlier felony as determined by the parole board.